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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals erred under Fed. R. Civ. P. 56(c) in making its summary finding, without evidentiary support and without remanding to the district court for the development of facts, that the term "damages" appearing in standard-form comprehensive general liability insurance policies has a narrow, technical meaning in the insurance context that differs from its broader meaning to lay policyholders, thereby precluding coverage under the policies for environmental cleanup costs incurred by state and federal governments?

2. Whether the Eighth Circuit Court of Appeals, in a case based on diversity jurisdiction, erred in failing to follow the rule of decision in Missouri that insurance policy terms are construed as they would be understood by laypersons, and instead, following a conflicting rule of other forums, thereby holding that the term "damages" in standard-form comprehensive general liability insurance policies does not include policyholders' liability for environmental cleanup costs incurred by state and federal governments?

THE PARTIES

Petitioner is the state of Missouri. Respondent is Continental Insurance Companies ("Continental"), a New Hampshire corporation. Additional parties include Northeastern Pharmaceutical & Chemical Co., a Delaware corporation, and Milton Turkel, Edwin B. Michaels, and John W. Lee, all residents of Connecticut.

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OPINIONS OF THE DISTRICT COURT AND COURT OF APPEALS

The district court's opinion in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, No. 5034-CV-S-4 (W.D. Mo.), was filed June 25, 1985 (Appendix at A63-82). That opinion is not officially reported.

The Eighth Circuit Court of Appeals panel decision issued Jan. 22, 1987 is reported at 811 F.2d 1180 (8th Cir. 1987). Petitions for rehearing *en banc* were granted, and the order granting rehearing is reported at 815 F.2d 51 (8th Cir. 1987). The Eighth Circuit's *en banc* decision dated February 26, 1988 is reported at 842 F.2d 977 (8th Cir. 1988).

JURISDICTIONAL STATEMENT

This petition for writ of *certiorari* seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., et al.*, 842 F.2d 977 (8th Cir. *en banc* 1988). The Eighth Circuit denied petitioner's petition for rehearing on May 4, 1988. Petitioner state of Missouri seeks a writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF STATUTES AND RULES INVOLVED IN THIS CASE

This case involves a dispute concerning insurance coverage for liability asserted by the state of Missouri against a comprehensive general liability insurance policyholder pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a). This case also involves the application of Rule 56(c) of the Federal Rules of Civil Procedure. Pursuant to Supreme Court Rule 21(f), the text of CERCLA section 107(a) and Rule 56(c) are set out below.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

Sec. 107. (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which cause the incurrence of response costs, of hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i).

* * *

42 U.S.C. § 9607(a).

FEDERAL RULE OF CIVIL PROCEDURE 56

* * *

(c) **Motion and Proceedings Thereon.** The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

STATEMENT OF THE CASE[1]

This case arises out of standard-form comprehensive general liability ("CGL") insurance policies issued from 1970 to 1972 to Northeastern Pharmaceutical & Chemical Co. ("NEPACCO") and involves NEPACCO's insurance coverage for costs incurred by the United States and the state of Missouri to clean up environmental contamination pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, and other provisions of statutory and common law.

At issue in this appeal is the manner in which the Eighth Circuit, in reviewing an entry of summary judgment, interpreted a critical, disputed standard-form insurance policy term: "damages." In affirming summary judgment on grounds other than those relied upon by the trial court the Eighth Circuit held that to a lay policyholder the term "damages" is ambiguous and broad enough to cover CERCLA environmental cleanup costs, but concluded that "damages" has a narrower, technical "plain meaning" in the insurance context that excludes such costs. *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 985-86 (8th Cir., *en banc* 1988). Appendix at A18-19.

In the trial court Continental conceded that governmental claims for reimbursement of CERCLA hazardous waste site cleanup costs were "damages." *See* note 10, *infra*. The Eighth Circuit's finding that "damages" has a "plain meaning" in the insurance context that differs from its meaning to the layperson was not presented to the trial court and has no factual support in the record.

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1. Extensive discussions of the factual and procedural history of this case are found in the *en banc* order, *Continental Insurance Cos. v. NEPACCO*, 842 F.2d 977 (8th Cir. *en banc* 1988) (Appendix at A1-30) and in the panel decision, *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 811 F.2d 1180 (8th Cir. 1987). Appendix at A31-62.

Moreover, in this action based upon diversity jurisdiction in which the law of Missouri is conceded by all to apply, the Eighth Circuit interpreted the disputed policy term by relying upon the law of other jurisdictions while failing to apply Missouri's rule of insurance policy construction requiring that an insurance policy term be interpreted as it would be understood by the lay policyholder.

1. The Underlying Claims Against NEPACCO Based Upon Environmental Damage.

From 1970 to 1972 NEPACCO produced hexachlorophene at a chemical plant in Verona, Missouri. The process produced a variety of wastes, including dioxin. In July 1971 NEPACCO arranged to dispose of at least 85 55-gallon drums of these wastes in a trench on a farm near Verona, Missouri, which has come to be known as the "Denney Farm site."

Later in 1971 or 1972 NEPACCO hired Independent Petrochemical Corporation ("IPC") which, in turn, hired Russell Bliss to dispose of more dioxin-contaminated wastes. In 1971, 1972, and 1973, these wastes were spread on the Bubbling Springs Stables in Fenton, Missouri and on the roads of Times Beach, Missouri. In 1974 a Mr. Minker purchased contaminated dirt from the Bubbling Springs Ranch and used it as landfill on his property, which came to be known as the "Minker/Stout/Romaine Creek site."

In 1980 the United States Environmental Protection Agency ("EPA") investigated the Denney Farm site and found dioxin from the NEPACCO wastes. It cleaned up the site and then sought to recover its costs through a lawsuit against NEPACCO and others. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part and remanded*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, ...

U.S. ....., 108 S.Ct. 146 (1987). This lawsuit is referred to in the decisions below as the "*EPA* suit." As a result of that lawsuit, NEPACCO and the other defendants have been held jointly and severally liable for cleanup costs of more than $150,000.[2]

2. NEPACCO's Insurance Coverage.

From 1970 to 1972 NEPACCO was insured under three standard-form comprehensive general liability ("CGL") insurance policies issued by Continental Insurance Company. Each policy requires Continental to:

> Pay on behalf of the insured all sums which the insured shall become legally obligated to pay as *damages* because of . . . property damage to which this insurance applies caused by an occurrence . . . .

(Emphasis added.) Although several policy clauses have been the subject of contention in this action, this clause is the only one at issue in this petition.[3]

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2. CERCLA establishes a trust fund—typically referred to simply as the "Superfund"—administered by EPA to pay for a variety of activities to identify, investigate and clean up where necessary sites at which hazardous substances are posing a health or environmental threat. CERCLA § 111, 42 U.S.C. § 9611. Often these sites are old, abandoned hazardous waste disposal sites.

When EPA incurs costs to clean up a hazardous waste disposal site it may sue pursuant to CERCLA § 107(a)(1-4)(A), 42 U.S.C. § 9607(a)(1-4)(A), any of several classes of potentially responsible parties to reimburse it for its cleanup costs, sometimes referred to as "response costs." *See, e.g., U.S. v. NEPACCO*, 810 F.2d 726, 731.

States, including the state of Missouri, also frequently undertake their own hazardous waste site cleanup activities. States also may sue potentially responsible parties pursuant to CERCLA § 107(a)(1-4)(A) to recover their cleanup expenses.

Such state and federal governments' cost recovery claims pursuant to CERCLA § 107 and pursuant to other statutes or common law seeking reimbursement for their costs incurred in cleaning up hazardous waste site contamination are at the heart of this insurance coverage dispute.

3. The Eighth Circuit expressly stated that because of its ruling on the meaning of the word "damages" in this clause, it did not need to reach the other numerous issues raised on appeal. Appendix at A13-14.

3. Proceedings in the District Court.

a. Continental's Declaratory Judgment Action.

In February 1984 Continental filed in the United States District Court for the Western District of Missouri this action against NEPACCO and its former officers and directors. *Continental Insurance Cos. v. NEPACCO,* No. 84-5034-CV-S-4 (W.D. Mo. filed Feb. 9, 1984). Continental sought a declaratory judgment that it had no duty to defend or to indemnify NEPACCO or its former officers for liability arising out of NEPACCO's waste disposal, including the judgment in the *EPA* suit.

The district court's jurisdiction was invoked by diversity of citizenship, with an amount in controversy exceeding $10,000, pursuant to 28 U.S.C. § 1332.[4] Throughout the district and appellate court proceedings, all parties have agreed that Missouri law applies.

NEPACCO and the other defendants failed to enter an appearance or file an answer.[5] Rather than seeking a default judgment against NEPACCO and the other defendants, in November 1984 Continental moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

b. State of Missouri Action to Intervene.

In December 1984 the state of Missouri moved to intervene in the present case to protect its interest as a

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4. The plaintiff, Continental, was a New Hampshire corporation with its principal place of business in New York. Defendant NEPACCO had been a Delaware corporation with its principal place of business in Connecticut (*U.S. v. NEPACCO,* 810 F.2d at 729). Defendants Turkel, Michaels, and Lee, NEPACCO's former officers, were residents of Connecticut.

5. By 1984 NEPACCO essentially had been defunct for ten years. *See United States v. Northeastern Pharmaceutical & Chemical Co.,* 579 F. Supp. 823, 827 (W.D. Mo. 1984).

potential judgment creditor of NEPACCO.[6] The district court granted the state's motion.

The state filed suggestions opposing Continental's motion for summary judgment. Among other grounds, the state asserted that disputed issues of material fact, including the parties' intent in entering the contracts for insurance coverage, precluded summary judgment under Rule 56(c).[7] At the time the district court entered summary judgment, discovery was pending.[8]

In the district court proceedings Continental did not raise the contention—later adopted by the Eighth Circuit in its *en banc* decision—that the term "damages" in the standard-form policies issued to NEPACCO excluded governmental claims for reimbursement of environmental cleanup costs asserted against NEPACCO pursuant to CERCLA. Although its complaint in this action contains 23 pages of detailed allegations stating why Continental believed it should not be required to provide coverage, and

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6. The state of Missouri has filed three actions against NEPACCO and others as a result of costs incurred in cleaning up dioxin contamination in Times Beach, the Minker/Stout/Romaine Creek site, and the Bliss farm site (at which Mr. Bliss also allegedly sprayed dioxin-contaminated oil). *Missouri v. Syntex U.S.A., Inc. et al.*, No. 85-2856-C-6 (E.D. Mo. filed Nov. 27, 1985); *Missouri v. Independent Petrochemical Corp., et al.*, No. 83-3670 (E.D. Mo. filed Nov. 23, 1983) (referred to as the "IPC Suit" in the district court and court of appeals opinions); *Missouri v. Bliss, et al.*, No. 84-1447-C(4) (E.D. Mo. filed June 20, 1984).

As of November 1986 the state of Missouri already had spent nearly $3 million to clean up the dioxin contamination at these sites, and cleanup is ongoing. The state's projected share of the cost to clean up the four primary dioxin-contaminated sites in Missouri (Times Beach, the Minker/Stout/Romaine Creek site, Quail Run, and Castlewood) is $20 million.

7. Defendant-Intervenor State of Missouri's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment, at pp. 6-7, served March 8, 1985.

8. *Continental Insurance Cos. v. NEPACCO*, No. 84-5034-CV-S-4 (W.D. Mo. filed June 25, 1985). Appendix at A66-67.

cites no fewer than 9 policy terms and provisions, nowhere does the complaint assert that costs at issue are not "damages."[9] Indeed, Continental conceded that the environmental cleanup cost recovery claims asserted against NEPACCO and its former officers in the *EPA* suit constituted claims for *"damages."*[10]

c. The District Court Decision.

In June 1985 the district court granted summary judgment in favor of Continental.[11] Among its rulings, the court held that the environmental cleanup costs sought by the United States and the state were not "property damage" as that term is defined in the CGL policies. Appendix at A75. Moreover, the court held that "no . . . damages were incurred by the governmental entities during the time of the policies' effective dates" because the policies were in effect only from 1970 to 1972, whereas the cleanup costs were incurred many years later, in 1980 and 1982, after the policies had expired. Appendix at A68, 74-76.[12]

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9. Continental's complaint is supplied in the Appendix at A85-105.

10. *See* Suggestions in Support of Plaintiff's Motion for Summary Judgment in *Continental Insurance Cos. v. NEPACCO*, No. 84-5034-CV-S-4 (W.D. Mo. filed Nov. 14, 1984). Continental said, "CERCLA authorizes the government to seek *as damages* the reimbursement of hazardous waste cleanup costs . . ." (emphasis added) at 38; and, "All *damages* claimed [in the *EPA* suit] are in the nature of 'clean-up' costs" (emphasis added) at 42. *See also id.* at 19-20, 29, 32, 38 and 52 (characterizing CERCLA cost recovery actions as seeking "damages"). Excerpts are supplied in Appendix at A106-14; see particularly, pp. A108-09, 111, 113.

11. *Continental Insurance Cos. v. NEPACCO*, No. 84-5034-CV-S-4 (W.D. Mo. June 25, 1985). Appendix at A63-83.

12. Notably, the district court concluded, without discussion, that the state and federal government CERCLA cost recovery claims sought "damages" against NEPACCO. Appendix at A71-72, 74 (referring to such claims as "damages") and A75-76 (referring to such claims as claims for "loss or damage").

4. Proceedings in the Court of Appeals.

a. The Panel Decision.

The state of Missouri appealed the district court's order. The argument that environmental cleanup costs under CERCLA do not constitute "damages" under the standard-form CGL policy was raised for the first time —by *amicus curiae* American Insurance Association ("AIA")—before the Eighth Circuit panel.

The majority rejected the district court's rationale for holding that insurance coverage did not apply to the *EPA* suit. The majority rejected the view that the federal and state governments did not suffer any loss or damage until cleanup costs actually were incurred. Appendix at A42-44. The panel also rejected the argument advanced by AIA that cleanup costs under CERCLA were not "damages." Appendix at A44-49.

The court discussed the events that trigger coverage under standard-form CGL policies (Appendix at A77-81), but that discussion is not the subject of this petition.

b. Rehearing En Banc.

The Eighth Circuit granted motions for rehearing *en banc* and in a 5-to-3 decision reversed the panel opinion. In doing so the court stated, "The dispositive issue is whether the term 'damages' in the standard-form CGL policy includes cleanup costs." Appendix at A13.

The court held that the term "damages" is ambiguous to laypersons and would be interpreted by the policyholder to include governmental claims for reimbursement of hazardous waste site cleanup costs. Nevertheless, the court found—without any basis in the factual record before the court—that in the *insurance context* the term "damages" is *not* ambiguous and has a narrower, technical meaning that precludes coverage for such

costs. The court noted that claims for these costs are considered "equitable" claims for monetary relief, and stated that CGL policies do not provide coverage for equitable relief. Appendix at A17-18.

The court did not cite any Missouri cases for these propositions, but cited cases applying the law of Maryland, Florida and New Hampshire. Appendix at A18-20.

The state of Missouri now brings this petition seeking review of the Eighth Circuit's *en banc* order.

ARGUMENT AND AUTHORITIES

I. The Court of Appeals' Summary Finding That "Damages" Has An Unambiguous Narrow, Technical Meaning In The Insurance Industry Is A Factual Determination Which Cannot Be Made In An Evidentiary Void On A Motion For Summary Judgment.

The Eighth Circuit's result is premised upon its conclusion on page 16 of its February 26, 1988 order:

> [T]he plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief.

Appendix at 18. Although stated in a conclusory fashion, this determination is based upon the implicit factual finding[13] that the term "damages" has a meaning in the in-

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13. While the court attempted to frame its finding as a matter of law, it was a factual finding. First, the court stated that the term "damages" excludes claims for equitable relief as a matter of "[b]lack letter insurance law." Appendix at A18. As the dissent notes, however, the conflict in the courts renders this characterization inappropriate. Appendix at 26.

Moreover, while courts may impart a particular meaning to a contract term, this does not create a presumption that such a meaning was intended unless courts repeatedly have interpreted certain words as having a particular meaning and

(Continued on following page)

surance context that differs from its meaning elsewhere. In the preceding paragraph of its opinion the court held that

> outside the insurance context, the term "damages" is ambiguous . . . [F]rom the viewpoint of the lay insured, the term "damages" could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs or losses.

Appendix at A17-18. Thus, the court drew a clear distinction between the manner in which laypersons interpret the term "damages" and what the court perceived to be a narrower interpretation of that term in the "insurance context." The only basis asserted for creating this distinction is the fact that governmental claims under CERCLA for reimbursement of hazardous waste site clean-up costs have been held to be "equitable," rather than "legal," monetary claims for restitution. Appendix at A17-18.[14]

Footnote continued—

drafters continue to use such words with knowledge of the courts' interpretation. *See, e.g., Parker v. Provident Life & Acc. Ins. Co.*, 582 S.W.2d 380, 383 (Tenn. 1979).

In addition, as discussed in Subpart I.B., *infra*, the court implicitly found a custom and usage in the insurance industry. This is a factual determination requiring factual support.

Finally, the authorities on which the court relied do not adequately support its conclusion that "damages" has a specialized meaning in the insurance context. This determination, in the first instance, must be based on factual evidence. None of the courts cited by the majority conducted any factual inquiry regarding the manner in which insurers interpret the term "damages." Absent such an inquiry and a well-supported factual finding, the issue cannot be disposed of as a matter of law.

14. Courts which have discussed the "equitable" nature of environmental cost recovery claims under CERCLA have done so in the context of ruling that defendants in actions brought pursuant to CERCLA do not have a right to a trial by jury guaranteed by the Seventh Amendment to the United States Constitution. *See U.S. v. NEPACCO*, 810 F.2d at 749 and cases cited therein.

The argument that the term "damages" does not include governments' CERCLA cost recovery claims was not presented to the trial court, however, and there is not a single fact in the record to support the conclusion that the term "damages" in the insurance industry is interpreted any differently than it is understood by lay policyholders. It was improper for the Eighth Circuit to affirm summary judgment on the basis of an argument which was not presented to the trial court and which is not supported by the record. Moreover, it was improper for the court of appeals, on summary judgment pursuant to Rule 56 and without the benefit of any evidence, to make the factual determination that the term "damages" has a "plain meaning" in the insurance industry that differs from its meaning elsewhere. Indeed, a substantial body of evidence makes clear that both the insurance industry and Continental consistently use the term "damages" to include environmental cleanup and CERCLA response costs. Because of the procedural posture of this case, the state never had an opportunity to develop or present that evidence. Its existence makes clear, however, that judgment in Continental's favor was inappropriate because there remained at least one disputed issue of material fact.

A. It Was Improper For The Eighth Circuit To Affirm Summary Judgment On The Basis Of An Argument Presented For The First Time On Appeal For Which There Is No Support In The Record.

The Eighth Circuit rejected the rationale of the district court, but elected to affirm summary judgment because of the appellate court's narrow interpretation of the term "damages" in the insurance context. The issue whether "damages" includes governmental claims for reimbursement of environmental cleanup costs first was raised by *amicus* AIA on appeal. The issue was not

raised by a party until Continental filed its supplemental brief for rehearing *en banc*. Appendix at A15. Undoubtedly based upon Continental's concessions on the matter, the district court assumed without discussion that those claims were "damages."[15] Needless to say, no evidence was presented to the district court to support AIA's assertion. It was, therefore, inappropriate for the Eighth Circuit to affirm summary judgment on this ground.

A court reviewing an entry of summary judgment is "merely authorized to review the propriety of the grant *on the basis of matters of record at the time the summary judgment was entered.*" *Munoz v. International Alliance of Theatrical Stage Emp. & Moving Picture Mach. Operators*, 563 F.2d 205, 209 (5th Cir. 1977) (emphasis supplied). Evidence and factual assertions not presented to the trial court will not be considered on appellate review. *Id.* at 209; *Denis v. Liberty Mutual Ins. Co.*, 791 F.2d 846, 849 (11th Cir. 1986). "Failure to raise an issue, objection or theory of relief in . . . the trial court generally is fatal." *Denis*, 791 F.2d at 849.[16]

A reviewing court may affirm summary judgment on grounds which differ from those of the trial court. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 363 (4th Cir. 1985). At least one court has held that the ground for affirmance need not have been addressed by the trial court, but it *must be supported by the record*. *Katter v. Arkansas Louisiana Gas Co.*, 765 F.2d 730, 734-35 (8th Cir. 1985). In the present case, the court affirmed summary judgment on grounds for which there is no record and

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15. *See* discussions at notes 10 and 12, *supra*.

16. *See also, Federal Deposit Ins. Co. v. Lauterbach*, 626 F.2d 1327, 1331 n.8 (7th Cir. 1980) (objections); *Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978) (allegations); *Lacey v. Lumber Mutual Fire Ins. Co. of Boston*, 554 F.2d 1204, 1205 (1st Cir. 1977) (arguments).

which were conceded away in the trial court. See Appendix A108-09, 111, 113.

The Eleventh Circuit has held that "the appellate court has the discretion to resolve a question for the first time on appeal, especially if the issue is legal in nature and failure to consider it would result in a miscarriage of justice." *Denis*, 791 F.2d at 849. This Court also has recognized the appellate court's discretion to consider questions not presented to the trial court but only when "the proper resolution is beyond any doubt [citation omitted] or where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976).

As discussed in note 13, *supra*, this case involves a factual question, not a legal issue. Moreover, the state has not had the opportunity to contest, in an appropriate forum, the factual conclusion that the term "damages" has a specialized meaning in the insurance industry. The state is prepared to contest this finding, however, as discussed, *infra*, Subpart I.C. Thus, the existence of a "plain meaning" of the term "damages" in the insurance context is not "beyond any doubt," as required by this Court's ruling in *Singleton*. Finally, as in *Singleton*, "injustice [is] more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." 428 U.S. at 121, 96 S.Ct. at 2877. Because evidence exists which directly controverts the Eighth Circuit's finding (Appendix at A106-27), this case must be remanded to the trial court to avoid manifest injustice.

This Court recently has reaffirmed the non-movant's responsibility to come forward with sufficient evidence to require the fact finder to resolve the issue at trial. *Anderson v. Liberty Lobby*, 447 U.S. 242, ..., 106 S.Ct. 2505, 2510 (1986). *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, ..., 106 S.Ct. 2548, 2553 (1986). The non-

moving party, however, is entitled to adequate time for discovery. *Celotex*, 106 S.Ct. at 2552-53. When a non-movant is presented with an issue for the first time on appeal, the non-movant is denied not only adequate time for discovery, but also access to a proper forum in which to present evidence of a factual dispute. The state is prepared to present sufficient evidence to demonstrate the existence of a factual dispute regarding the meaning of "damages" in the insurance industry. Remand to the trial court is necessary to provide this opportunity.

B. Remand To The Trial Court For A Factual Determination Is Necessary Before Any Court Can Conclude That The Term "Damages" Has A Narrow, Technical "Plain Meaning" In The Insurance Context That Differs From Its Broader, Ambiguous Meaning To Lay Policyholders.

The Eighth Circuit's ruling amounts to a decision that in the insurance industry there is a special custom and usage of interpreting the term "damages" differently than in other contexts.[17] The existence of custom and usage in a particular context, however, is a factual inquiry. *Transportation-Commun. Emp. U. v. Union Pac. R. Co.*, 385 U.S. 157, 163, 87 S.Ct. 369, 373 (1966) (quoting *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566-67, 66 S.Ct. 322, 325 (1946)) (interpreting collective bargaining agreements). This includes the insurance context. *Home Ins. Co. v. Aetna Cas. & Sur. Co.*, 528 F.2d 1388 (2d Cir. 1976) (understanding and custom of the insurance industry regarding the meaning of "batch

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17. *See*, Restatement (Second) Contracts § 219, comment a and § 220, comment a ("usage" is a habitual or customary practice of interpretation that may prevail in a special trade or other group; usage gives particular meaning to an agreement). *See also*, J. Appleman & J. Appleman, *Insurance Law and Practice*, § 7388 at 187 (1976) (discussing practices in the insurance industry as usage of trade).

clauses" are issues of material fact precluding summary judgment).[18] Putting aside the question whether it was appropriate for the court of appeals to apply an interpretation peculiar to the insurance industry after finding that to a layperson the term would include the cleanup costs at issue,[19] the existence and effect of a custom and usage in the insurance context requires factual support.[20]

The Eighth Circuit fails to cite a single fact supporting its decision to treat the term "damages" in the insurance context differently than in other contexts. This failure is not surprising because no factual record was developed on this point in the trial court. None was appropriate. Continental did not raise any issue in the trial court about the meaning of "damages" and conceded numerous times that the claims in question were "damages."[21]

Under Rule 56(c), summary judgment may be entered only if the facts and evidence before the trial court demonstrate that there is no "genuine issue as to any material fact." Fed. R. Civ. P. 56(c). In the absence of essential factual support it was inappropriate for the Eighth Circuit to affirm summary judgment based on the assumption that the term "damages" has a narrow, technical meaning in the insurance context.

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18. *See* J. Appleman, *supra*, § 7388 ("Where no evidence as to custom is shown or where no custom is found to exist the rights of the parties will be determined strictly from the contract." *Id.* at 184-85. "[W]ords used in insurance contracts are to be understood according to their ordinary scope and meaning unless a more restricted use is established by general mercantile usage, or expressly brought to the notice of both 'parties.'" *Id.* at 185).

19. *See* discussion in Part II., *infra*.

20. Under Missouri law, parol evidence is appropriate to determine the technical meanings of contract terms that are peculiar to certain occupations. *Busch & Latta Painting Corp. v. State Highway Comm'n*, 597 S.W.2d 189, 202-03 (Mo. App. 1980).

21. *See* note 10, *supra*.

Indeed, summary judgment frequently is denied in insurance coverage cases because of issues of fact about whether the underlying claim is within the scope of the insurance policy. Determining coverage frequently involves "questions requiring the construction of the policy in light of the parties' understanding and customs of the insurance industry." 10A Wright, Miller & Kane, *Federal Practice and Procedure,* § 2730.1 at 293. "When evidence of the custom and usage of the trade is required in order to interpret an agreement, the Rule 56 motion will be denied." *Id.* at 284.

The Eighth Circuit circumvented these long-standing principles by affirming summary judgment on the basis of a factual finding for which it had no factual support. The state is prepared to contest the court's finding, however, as discussed in Subpart I.C. The existence of this disputed factual issue renders summary judgment improper under Federal Rule of Civil Procedure 56(c). The cause should be remanded to the trial court for a factual hearing to determine whether, indeed, there exists in the insurance industry a custom and usage or technical meaning of the term "damages."

C. Insurers Regularly Have Described Environmental Cleanup Costs And CERCLA Cost Recovery Claims As "Damages," Precluding A Finding That In The Insurance Context The Term Has A "Plain Meaning" That Excludes Those Costs.

Available evidence[22] demonstrates that the insurance industry as a whole and Continental in particular have

22. This Court, of course, is not the appropriate forum in which to present new evidence to resolve this factual dispute. This discussion of evidence is presented to demonstrate the types of facts, documents and testimony that are available to determine, upon remand to the district court, whether the insurance industry has attached a narrow, technical meaning to the term "damages."

interpreted the term "damages" to include equitable monetary relief such as environmental cleanup costs. Thus, the term does not have a specialized, narrow "plain meaning" in the insurance context that differs from its broader meaning to laypersons.

Continental itself in the trial court explicitly referred to the underlying claims as claims for "damages."[23] Continental did not even raise the question whether governmental claims under CERCLA for reimbursement of hazardous waste site cleanup costs constituted "damages" until rehearing before the Eighth Circuit. Certainly Continental has not attached a "plain meaning" to the term "damages" that precludes its application to such claims.[24]

The insurance industry as a whole also has not applied the narrow, technical "plain meaning" of the term "damages" attributed to it by the Eighth Circuit that would preclude the term from providing coverage for environmental cleanup costs.[25] The minutes of an October 28, 1969 meeting of the Insurance Rating Board General Liability Governing Committee[26] describe a dis-

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23. *See* note 10, *supra*.

24. Under Missouri law, such a practical construction by the insurer of the meaning of a policy term is given great weight in interpreting the policy and is binding upon the insurer. *Aetna Casualty & Surety Company v. Haas*, 422 S.W.2d 316, 320 (Mo. 1968).

25. The court stated, "The dispositive issue is whether the term 'damages' in the standard-form CGL policy includes cleanup costs." Appendix at A13.

26. The Insurance Rating Board was the successor to the National Bureau of Casualty Underwriters and the predecessor to the current Insurance Services Office. These organzations for decades have developed standard-form CGL policies that are used throughout the property and casualty insurance industry. For a discussion of the drafting history of standard-form CGL insurance policies, see *American Home Products Corp. v. Liberty*

(Continued on following page)

cussion of pollution exclusion clauses then being proposed for inclusion in the insurance industry's standard-form CGL policies. Expressing concern about the effect on the insurance industry of several then-recent off-shore oil spills, the minutes state, "Damages, *including the cost to clean up*, may be catastrophic." Appendix at A115. (Emphasis added.) Clearly, in 1969 the insurance industry understood that environmental cleanup costs were "damages."[27]

This understanding continues today. The 1984 Insurance Services Office Commercial General Liability Occurrence Form includes a specific exclusion for environmental cleanup costs (Appendix at A120) which would not be necessary if the industry had a clear understanding that the "plain meaning" of the term "damages" does not include environmental cleanup costs.[28]

In addition, Richard E. Stewart, who formerly was a Senior Vice-President and Director and Chief Financial Officer of the Chubb Group of Insurance Companies

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Footnote continued—

Mutual Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984), and Chesler, Rodburg, and Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9, 14-16 (1986).

Expressions by the policy drafters of the terms' intent have been accepted as evidence of policy meaning in numerous cases. *American Home Products, supra; Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987); *New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987); *Kipin Industries, Inc. v. American Universal Ins. Co.*, No. C-860658 (Ohio Ct. App., 1st Dist. Aug. 12, 1987) (Available in Westlaw and Lexis databases).

27. This is but one of thousands of pages of documents containing expressions of the insurance industry's understanding of the meaning of its standard policy forms.

28. *Cf. CPS Chemical Co., Inc. v. Continental Ins. Co.*, 222 N.J. Super. 175, 536 A.2d 311 (App. Div. 1988).

and a former Superintendent of Insurance for the state of New York, on March 7 and 8, 1988 testified that the term "damages" in standard-form CGL insurance policies includes environmental cleanup and CERCLA response costs and that such expenses are covered under the policies. Appendix at A121-27.

This evidence, along with other evidence that is available and can be developed through discovery, makes clear that, like the lay policyholders described by the Eighth Circuit, both Continental and the insurance industry use the term "damages" to "include all monetary claims, whether those claims are described as damages, expenses, costs or losses." Appendix at A17-18. Like the policyholders' understanding, the insurance industry's meaning of "damages" certainly is broad enough to encompass equitable monetary claims under CERCLA to reimburse governmental hazardous waste site cleanup costs.

This evidence provides significant support for the state's interpretation of the term "damages" in Continental's policies. It need not be conclusive; it demonstrates that facts supporting the state's interpretation exist. At the very least, the evidence raises an issue of material fact, making improper summary judgment under Rule 56(c).

It would be unfair in the face of this available evidence to deny the state the opportunity to develop such evidence and present it to a fact finder. The unfairness particularly is acute here because the state had no indication in the district court that Continental would assert this basis as a limitation on its coverage to NEPACCO. Accordingly, this case should be remanded to the trial court for a factual determination.

II. The Eighth Circuit Misapplied the Erie Doctrine By Ignoring Missouri Rules Of Insurance Policy Construction Under Which Policy Terms Are Interpreted As They Would Be Understood By A Layperson And Instead, Interpreting The Term "Damages" According To A Technical Meaning Applied By Laws Of Other Jurisdictions.

As agreed by all parties and the Eighth Circuit, and under the choice of law doctrine set out in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938), the Eighth Circuit was bound to apply the substantive law of Missouri to determine whether the term "damages" includes environmental cleanup costs. Missouri principles of insurance policy construction lead inarguably to the conclusion that such claims come within the term "damages." The Eighth Circuit, however, did not follow Missouri law. Instead, it followed conflicting law of other jurisdictions. This violated the Eighth Circuit's duty under *Erie* and imposed the law of a foreign jurisdiction upon the state of Missouri.

In a diversity action, a federal appellate court must ascertain and apply state substantive law whenever it is controlling. *Huddleston v. Dwyer,* 322 U.S. 232, 64 S.Ct. 1015 (1944). The Eighth Circuit should have applied Missouri law even if it believed the law was wrong or contrary to the great weight of authority elsewhere. *West v. AT&T,* 311 U.S. 223, 235-36, 61 S.Ct. 179, 182-83 (1940).

In Missouri, the rules of insurance policy construction are clear. Policy terms are interpreted as they would be understood by a lay policyholder, not as they might be interpreted by persons well-versed in the insurance industry. *Robin v. Blue Cross Hospital Services,*

Inc., 637 S.W.2d 695, 698 (Mo. *en banc* 1982); *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15, 27 (Mo. 1969) (layman's definition will be applied over a technical definition); *Stafford v. Travelers Ins. Co.*, 530 S.W.2d 23, 25 (Mo. App. 1975) (same principle). Moreover, ambiguous policy terms are construed against the insurer, *Robin, supra,* and "[a]n insurance contract reasonably susceptible of *any* interpretation favorable to the insured will be so construed." *Bellamy v. Pacific Mut. Life Ins. Co.*, 651 S.W.2d 490, 495 (Mo. 1983) (emphasis added).

The Eighth Circuit correctly noted that the term "damages" is ambiguous to laypersons outside the insurance industry and broad enough to include governmental claims for reimbursement of CERCLA hazardous waste site cleanup costs. Appendix at A17-18. Based upon Missouri's rules of insurance policy construction, this should have ended the inquiry. The court should have ignored the narrow, technical definition. *Wheeling Stamping Co. v. Birdsboro Steel Foundry & Machine Co.*, 245 F.2d 752 (3d Cir. 1957) (state rules of construction are to be used by federal court when state law applies).

In choosing to adopt the narrow, technical definition of "damages," the Eighth Circuit did not cite a single Missouri case. Primarily, the court relied upon *Maryland Casualty Co. v. Armco Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied,* ..... U.S. ....., 108 S.Ct. 703 (1988), decided under Maryland law. Maryland does not apply the rule, applicable in Missouri and elsewhere, that insurance policy terms are construed most strongly against the insurer.[29] Moreover, the Fourth Circuit in *Armco* noted that "Mary-

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29. *Compare Robin*, 637 S.W.2d at 698, with *Truck Ins. Exchange v. Marks Rentals, Inc.*, 288 Md. 428, 418 A.2d 1187, 1191 (1980).

land law . . . has . . . adopted the somewhat narrow, technical definition of damages." *Id.* at 1352 (citing *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435 (D. Md. 1977)). The Eighth Circuit also cited cases applying the laws of Florida and New Hampshire. Reliance on these cases is an abandonment of controlling Missouri law in favor of law established in other jurisdictions.

Regardless of how other jurisdictions have ruled,[30] the Missouri Supreme Court would include cleanup costs within the term "damages." Indeed, the Missouri Supreme Court has held that restoration costs incurred to put property in its former condition, which are analogous to costs incurred to clean up environmental contamination, are recoverable as damages. *Jack L. Baker Co., Inc. v. Pasley Mfg. & Distrib. Co.*, 413 S.W.2d 268 (Mo. 1967). *See also, Zipkin v. Freeman*, 436 S.W.2d 753, 761 (Mo. *en banc* 1968) ("The word 'damages' is not limited to any particular kind of damage or injury . . ."). Given these principles, and given Missouri's rule of construing insurance policies as they would be understood by the lay policyholder, there is no basis upon which to conclude that the Missouri Supreme Court would rule that governmental claims for reimbursement of hazardous waste site

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30. As the dissent correctly notes, there is a split in authority among those jurisdictions that have considered whether the CGL policy term "damages" includes governmental claims for reimbursement of hazardous waste site cleanup costs. Appendix at A25-26. The majority also recognizes this split, citing cases contrary to its decision here. Appendix at A18-19 (citing *New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987); *U.S. Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843 (1983); *Broadwell Realty Services Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76, 82-83 (App. Div. 1987)). Thus, the issue of whether monetary claims for equitable relief can be claims for "damages" under liability insurance contracts is by no means a settled point of "black letter law" as characterized by the majority. Appendix at A18.

cleanup costs are not "damages" under standard-form CGL policies merely because such claims have been characterized as "equitable."

Clearly, the Eighth Circuit's abandonment of Missouri law was improper and constituted reversible error. Therefore, this Court should grant this petition, reverse and remand for an appropriate application of Missouri law.

III. The Issues Presented In This Case Are Material And Of Substantial Importance To The State Of Missouri As A Claimant Seeking To Recover Environmental Cleanup Costs From NEPACCO And Others, And To The Federal And State Governments Who Have Similar Claims Pending.

The state of Missouri has established a hazardous waste remedial fund administered by the Missouri Department of Natural Resources. Section 260.480.1 R.S.Mo. (1986). Missouri uses this fund to pay for the costs of conducting hazardous waste site cleanup activities when no responsible party will undertake the cleanup. In addition, this fund pays for Missouri's share of the cost of cleanups financed by the federal Superfund.[31] When Missouri is compelled to spend money from its hazardous waste remedial fund, it seeks to replenish its fund by recovering those costs from responsible parties pursuant to state and federal law, including CERCLA.

The circumstances surrounding NEPACCO provide a good example. To recover its costs in responding to contamination caused by NEPACCO's wastes at Times Beach, Missouri, the Minker/Stout/Romaine Creek site,

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31. Under CERCLA, states must pay at least 10 percent of the cost of many environmental cleanup activities conducted within their borders and paid for by the Superfund. CERCLA § 104(c)(3)(C), 42 U.S.C. § 9604(c)(3)(C).

and the Russell Bliss farm site, the state of Missouri has pursued claims against NEPACCO and others in three lawsuits. *See* note 6, *supra*. NEPACCO is defunct,[32] and the only known sources from which NEPACCO's liability to Missouri can be paid and the state's fund replenished are NEPACCO's insurance policies.

As of January 1, 1988, 51 hazardous waste disposal sites throughout the state of Missouri had been classified as abandoned or uncontrolled hazardous waste disposal sites pursuant to Missouri law.[33] Like NEPACCO, the liable parties at many of these sites are defunct and their standard-form CGL insurance policies containing the same provisions as NEPACCO's are the only source from which Missouri can recover even a portion of its cleanup costs. Under the Eighth Circuit's interpretation of the term "damages" in the standard-form CGL insurance policy, those potential sources of reimbursement suddenly have evaporated.

The adverse effect of the Eighth Circuit's decision is not limited to the state of Missouri, or even to states within the Eighth Circuit's jurisdiction. The Eighth Circuit's factual finding that in the insurance context the term "damages" has a narrow, technical meaning that does not include governmental claims under CERCLA for reimbursement of hazardous waste site cleanup costs already is being cited by insurance companies throughout the nation seeking to avoid providing coverage under the standard-form policies they issued to companies liable

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32. *See* discussion at note 5, *supra*, and Appendix at A8.

33. Section 260.440 R.S.Mo. (1986). *See* Confirmed Abandoned and Uncontrolled Hazardous Waste Disposal Sites in Missouri, Fiscal Year 1987 Annual Report (Missouri Department of Natural Resources 1988).

for such costs.[34] It is improper and unfair to allow to stand the factual finding—undeveloped in the trial court and unsupported by any record before the district court or the Eighth Circuit—that in the insurance context there is a narrow, technical "plain meaning" of the term "damages" that differs substantially from the term's broader, ambiguous meaning to the public at-large.

CONCLUSION

There can be no doubt that the Eighth Circuit in this action committed error. First, it leaped to an unsupported—and unsupportable—factual conclusion that in the insurance context the term "damages" has a narrow, technical meaning that does not include environmental cleanup costs. Even if the Eighth Circuit had been inclined to believe that "damages" should have a specialized meaning in the insurance context, it is not the role of the appellate court to hold that such a meaning exists until presented with a trial court finding and with testimony, documents and other evidence developed in the trial court to support such a factual finding. The Eighth Circuit should have remanded to the district court for development of evidence to determine whether, indeed, there exists a narrow, specialized meaning of the

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34. *See, e.g.*, "Appellate Court Denies Cover for Cleanup Costs," *Business Insurance*, March 7, 1988, pp. 1, 100 (statement of Barry Ostrager). The potentially widespread effect of this decision is demonstrated by noting that the U.S. Environmental Protection Agency has listed or proposed for listing more than 1,000 hazardous waste disposal sites in all fifty states on its National Priorities List, a list of sites potentially eligible for cleanup with money from the Superfund, 52 Fed. Reg. 27,620, *et seq.* (July 21, 1987). For a discussion of the pervasive nature of asserted and potential claims based on hazardous waste site liability costs, and the role of insurance coverage in helping to shoulder the burdens of that liability, *see* Chesler, at note 21, *supra*.

term that differs from its broader, ambiguous meaning to laypersons. Permitting appellate courts to affirm a drastic remedy such as summary judgment on the basis of a factual issue never presented to the trial court and a factual finding unsupported by the record denies the non-moving party the opportunity to respond to the factual issue in the proper forum. Such action circumvents the basic principles of appellate review and renders summary judgment a tool to unfairly and permanently foreclose the opportunity to a full and fair hearing.

Second, the Eighth Circuit failed to follow the requirements of the *Erie* doctrine. It did not apply the Missouri rule of insurance policy construction under which an insurance policy must be interpreted as a layperson would understand it. The Eighth Circuit conceded that to a layperson the term "damages" is ambiguous and would include environmental cleanup costs. Under the Missouri rule of insurance policy construction, that finding should have ended the inquiry. Instead, the court reached out to find and apply the laws of other forums which rely on different rules of interpretation. In so doing, the Eighth Circuit ignored the fundamental principles set forth by this Court in *Erie*.

The cost of these errors is high. The rule established by the Eighth Circuit denies the state of Missouri any opportunity to replenish its hazardous waste remedial fund for costs it has incurred for which NEPACCO is responsible. Moreover, it adversely affects the ability of Missouri, other state governments and the federal government to secure reimbursement from proceeds of CGL insurance policies with identical terms issued to companies throughout the country.

WHEREFORE, the state of Missouri prays this Court grant the state's petition for *certiorari* to review the Eighth Circuit's judgment.

Respectfully submitted,

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87-1953

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX

(Filed February 26, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1940

Continental Insurance Companies,
Appellee,

v.

Northeastern Pharmaceutical & Chemical Company, Inc.. Milton Turkel, Edwin B. Michaels, and John W. Lee,
Appellees,

State of Missouri,
Intervenor-appellant.

Appeal from the United States District Court for the Western District of Missouri

Submitted: May 12, 1987
Filed: February 26, 1988

Before LAY, HEANEY, ROSS,* McMILLIAN, FAGG, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, *en banc*.

McMILLIAN, Circuit Judge.

This is an appeal from an order entered in the District Court[1] for the Western District of Missouri granting

*The Honorable Donald R. Ross, active Circuit Judge of this court at the time this case was argued and submitted, took senior status on June 13, 1987.

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

summary judgment in favor of Continental Insurance Cos. (Continental) on count I of its complaint and on the counterclaim filed by the state of Missouri and granting Continental's motion to dismiss without prejudice count II of its complaint. *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, No. 84-5034-CV-S-4, slip op. at 11, 16 (W.D. Mo. June 25, 1985) (hereinafter district court order). On appeal, a panel of this court affirmed in part and reversed in part. *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 811 F.2d 1180 (8th Cir. 1987) (hereinafter panel opinion).[2] Subsequently, the court granted the petitions for rehearing en banc filed by Continental and the state. 815 F.2d 51 (1987).

For the reasons discussed below, we hold that the term "damages" in the standard-form comprehensive general liability (CGL) policy does not include cleanup costs and accordingly affirm the order of the district court.

FACTUAL BACKGROUND

The following factual summary is taken in large part from the panel opinion, 811 F.2d at 1182-84. A more detailed statement of the factual background of the Denney farm site can be found in the underlying liability decisions, *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (*EPA*), *aff'd in part, rev'd in part and remanded*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

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2. The panel opinion was withdrawn and vacated by order of the court when rehearing en banc was granted. The following discussion refers to and cites the panel opinion because the analysis set forth in the panel opinion is necessary to an understanding of the development of the issues.

From 1970 to 1972 the Northeastern Pharmaceutical & Chemical Co. (NEPACCO) manufactured hexachlorophene in a factory in Verona, Missouri. (NEPACCO effectively ceased doing business sometime in 1974.) The manufacturing process produced a variety of hazardous wastes, including the highly toxic chemical, dioxin. In July 1971 NEPACCO disposed of about eighty-five 55-gallon drums of hazardous wastes by burying them in a trench on a farm near Verona (hereinafter the Denney farm site). Many of the drums had deteriorated and were in poor condition at the time of disposal; many broke open when they were dumped into the trench. A strong chemical odor persisted in the immediate area of the Denney farm site for several months thereafter.

In 1971 or 1972 NEPACCO hired Independent Petrochemical Corp. (IPC) to dispose of more hazardous wastes containing dioxin. IPC in turn hired Russell Bliss to actually dispose of NEPACCO's hazardous wastes. In 1971-1973 Bliss allegedly transported and sprayed the hazardous wastes, mixed with waste oil, as a dust suppressant on the grounds of the Bubbling Springs Stables in Fenton, Missouri, and on the roads of Times Beach, Missouri. In 1974 an individual named Minker bought dirt contaminated with NEPACCO hazardous wastes from the Bubbling Springs Stables to use as landfill on his property located in nearby Imperial, Missouri (the Minker/ Stout/ Romaine Creek site).

From 1970-1972 NEPACCO was insured under three standard-form CGL insurance policies issued by Continental. The first policy was in effect from August 5, 1970, to August 5, 1971, the second policy from August 5, 1971, to August 5, 1972, and the third policy from August 5, 1972, to November 17, 1972, when it was cancelled.

Each policy was slightly different, but each provided that Continental would

> pay on behalf of the insured all sums which the the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence, and [Continental] shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage.

The policies defined "property damage" as

> (1) Physical injury or destruction of tangible property which occurs during the policy period, including the loss of use thereof at anytime resulting therefrom,
>
> (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period . . . .

The policies further provided that "[t]his insurance applies only to . . . property damage which occurs during the policy period" and defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, injury or property damage neither expected nor intended from the standpoint of the insured." Only the second and third policies contained the following pollution exclusion clause:

> It is agreed that the insurance does not apply to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollu-

> tants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

For general information about standard-form CGL insurance policies, see *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984), and Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 Geo. L.J. 1237 (1986).

In 1980 the Environmental Protection Agency (EPA) investigated the Denney farm site. The EPA took soil and water samples and found "alarming[ly] high concentrations of dioxin" and other toxic chemicals. *EPA*, 579 F. Supp. at 831. The EPA secured and then "cleaned up" the Denney farm site. In August 1980 the federal government filed a lawsuit (the *EPA* lawsuit) against NEPACCO and others, seeking abatement costs, pursuant to § 7003(a) of the Resource Conservation and Recovery Act of 1976 (RCRA) (also known as the Solid Waste Disposal Act), as amended, 42 U.S.C. § 6973(a). In August 1982 the federal government filed an amended complaint adding claims for injunctive relief and reimbursement of its response costs pursuant to §§ 104, 106, 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (commonly known as Superfund), 42 U.S.C. §§ 9604, 9606, 9607 (reauthorized and amended in part by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (effective Oct. 17, 1986)).[3] We will use the descriptive term "cleanup costs"

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3. The 1986 Superfund Amendments do not affect this appeal.

to refer to both "abatement costs" under RCRA and "response costs" under CERCLA.

In January 1984 the district court held NEPACCO and several other defendants, jointly and severally, strictly liable for cleanup costs under CERCLA, but not RCRA. *EPA*, 579 F. Supp. at 834-37, 839-52. On appeal, a panel of this court affirmed in part, reversed in part and remanded the case to the district court for further proceedings. 810 F.2d at 749-50. The majority held that the federal government could recover cleanup costs under both RCRA and CERCLA. *Id.* at 732-46. The dissent did not agree that past non-negligent off-site generators or transporters of hazardous waste could be held liable for cleanup costs under the 1984 RCRA amendments or that the corporate officer defendants could be held liable for cleanup costs under RCRA as generators and transporters. *Id.* at 750-51 (J.R. Gibson, J., dissenting in part).

The *EPA* lawsuit prompted the filing of several other, related lawsuits, including the present case.

In March 1983 several former residents of the communities of Times Beach and Imperial filed an action in Missouri state court against NEPACCO and other defendants, seeking damages for present and future personal injury and property damage allegedly caused by the transportation and spreading of hazardous wastes and dirt, contaminated by dioxin and other toxic chemicals produced by NEPACCO, on the roads of Times Beach and at the Minker/ Stout/ Romaine Creek site. The plaintiffs also sought recovery of the costs of cleaning up the contaminated sites and punitive damages but asserted no RCRA or CERCLA claims. *Capstick v. Independent Petrochemical Corp.*, No. 832-00453 (Mo. Cir. Ct. filed Mar. 7, 1983) (*Capstick*).

In November 1983 the state filed a lawsuit in federal district court against NEPACCO and other defendants, seeking declaratory judgment and recovery of present and future response costs, pursuant to CERCLA and the common law of public nuisance, in connection with the state's cleanup of the Minker/ Stout/ Romaine Creek site. *Missouri v. Independent Petrochemical Corp.*, No. 83-2670-C (E.D. Mo. filed Nov. 23, 1983) (*IPC*).

Somewhat later, in February 1985 the federal government filed a garnishment action in federal district court against Continental, as NEPACCO's liability insurer, to collect the CERCLA cleanup costs the federal government had been awarded in the *EPA* lawsuit. *United States v. Continental Insurance Cos.*, No. 85-3069-CV-S-4 (W.D. Mo. filed Feb. 25, 1985) (garnishment action). Discovery was consolidated in the garnishment action and in the *IPC* lawsuit. On June 25, 1985, the same day judgment was entered in the case on appeal, the district court also entered judgment in favor of Continental in the garnishment action. The district court later granted the federal government's motion for reconsideration and the case was held in abeyance pending disposition of the *EPA* appeal.

In the meantime, in February 1984 Continental filed this action seeking a declaratory judgment concerning its liability to NEPACCO arising out of the underlying *EPA* and *Capstick* lawsuits. *Continental Insurance Cos. v. NEPACCO*, No. 84-5034-CV-S-4 (E.D. Mo. filed Feb. 9, 1984). Count I sought declaratory judgment concerning the federal government's *EPA* lawsuit (cleanup costs for the Denney farm site); count II sought declaratory judgment concerning the *Capstick* lawsuit (cleanup costs and damages for personal injury and property damage in Times Beach and at the Minker/ Stout/ Romaine Creek site). NEPACCO and the other defendants failed to enter an

appearance or file an answer. As noted earlier, in 1974 NEPACCO had ceased operations; its corporate assets had been liquidated and the proceeds distributed to its shareholders. Thus, by 1984 NEPACCO had been "defunct" for ten years. In November 1984 Continental moved for summary judgment.

In December 1984 the state filed a motion for leave to intervene in the present case in order to protect its interests in its related *IPC* lawsuit. In January 1985 the district court granted the state's motion to intervene, and the state filed an answer and a counterclaim alleging that Continental, as NEPACCO's liability insurer, was obligated to indemnify NEPACCO for any judgment against NEPACCO in the *IPC* lawsuit. In March 1985 the state filed suggestions in opposition to Continental's motion for summary judgment. Continental later filed a motion to dismiss count II without prejudice; the state filed suggestions in opposition.

DISTRICT COURT DECISION

In June 1985 the district court granted summary judgment in favor of Continental on count I (no liability insurance coverage for Denney farm site cleanup costs sought in the *EPA* lawsuit) and on the state's counterclaim (no liability insurance coverage for cleanup costs for the Minker/ Stout/ Romaine Creek site sought in the *IPC* lawsuit). First, the district court held that, under Missouri law, the time of an "occurrence" is the time the loss or damage is sustained, not the time the wrongful act is committed. District court order at 8 (citations omitted). The district court held that the claims for cleanup costs were not claims for compensation for "property damage." *Id.* at 10. Although the wrongful acts occurred in 1971-

1973, when the policies were in effect, cleanup costs were not incurred until 1980 and 1982, many years after the policies expired. The district court held that the federal and state governments did not suffer any "loss" or "damage" until the cleanup costs were actually incurred. *Id.* Thus, because there was no "occurrence" of loss or property damage during the policy periods, the district court held there was no coverage. *Id.* at 11.

The district court also decided that summary judgment was not appropriate on count II, with respect to the *Capstick* lawsuit, because more information was necessary in order to determine whether there was an "occurrence" of bodily injury or property damage, or both, within the policy periods and whether the pollution exclusion applied, and granted Continental's motion to dismiss without prejudice count II of its complaint. *Id.* at 11-17. The state appealed.

PANEL DECISION

The panel decision reversed in part and affirmed in part. The majority first held the policy definition of "property damage" included contamination of the environment by hazardous wastes, 811 F.2d at 1184-87, and rejected Continental's argument that any "injury" suffered by the federal and state governments from environmental pollution constituted only economic loss. *Id.* at 1184-89. The majority held that, in addition to the actual owners of the polluted land, water or air, the federal and state governments also sustained "property damage" "because of their '[quasi-sovereign] interest [in natural resources] independent of and behind the titles of its citizens in all the earth and air within [their]

domain.'" *Id.* at 1187 & n.17, *citing Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

The majority also expressly rejected the argument raised by amicus curiae American Insurance Association (AIA) that even if environmental contamination had caused "property damage," cleanup costs under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), were not in themselves recoverable as "damages." 811 F.2d at 1187-90. The majority reviewed the policy language and the statutory language and concluded that "cleanup costs under CERCLA are compensatory damages for 'property damage' within the meaning of the CGL policies." *Id.* at 1189 & n.21; *see also id.* at 1187-88 & n.17 (citing cases). *Cf. EPA*, 810 F.2d at 737-40 (abatement costs under RCRA § 7003(a), 42 U.S.C. § 6973(a)).

The remaining issue was whether there had been an "occurrence" of "property damage" during the period when the policies were in effect. Although the wrongful acts allegedly occurred during the early 1970's, the federal and state governments did not actually incur any cleanup costs until the early 1980's, many years after the third and last policy had been cancelled. The majority disagreed with the district court's view that the federal and state governments did not suffer any loss or damage until cleanup costs were actually incurred. 811 F.2d at 1190-91 & n.28 (distinguishing *Kirkham, Michael & Assocs. v. Travelers Indemnity Co.*, 361 F. Supp. 189 (D.S.D. 1973), *aff'd*, 493 F.2d 475 (8th Cir. 1974) (per curiam)). The majority predicted that Missouri courts would follow the majority view and adopt the "exposure" theory of coverage, 811 F.2d at 1191-92 & n.29, and accordingly held that "environmental damage occurs at the moment that

hazardous wastes are improperly released into the environment and that a liability policy in effect at the time this damage is caused provides coverage for the subsequently incurred costs of cleaning up the wastes." *Id.* at 1189 (footnotes omitted).

Applying the "exposure" theory, the majority determined that "property damage" occurred at the Denney farm site in July 1971, when the first CGL policy was in effect, when NEPACCO improperly disposed of the hazardous wastes by dumping the barrels in the trench. *Id.* at 1191. Accordingly, the majority reversed the grant of summary judgment in favor of Continental on count I and remanded for further proceedings to determine whether Continental was liable to indemnify NEPACCO for the award of cleanup costs in the *EPA* lawsuit. *Id.* at 1192.

Because contaminated dirt from the Bubbling Springs Stable was not used as landfill at the Minker/ Stout/ Romaine Creek site until 1974, two years after the third CGL policy had been cancelled, the majority held that Continental was under no duty to defend or indemnify NEPACCO for liability arising out of the *IPC* lawsuit and affirmed the grant of summary judgment in favor of Continental on the state's counterclaim. *Id.* Finally, the majority agreed with the district court that factual issues in the *Capstick* lawsuit precluded summary judgment and affirmed the district court's dismissal without prejudice of count II. *Id.* at 1193.

The dissent disagreed with the panel majority only on the issue of whether cleanup costs are "damages" within the meaning of the CGL policies. *Id.* at 1193-95 (McMillian, J., concurring in part and dissenting in part).

REHEARING EN BANC

Both Continental and the state filed petitions for rehearing en banc. Both petitions for rehearing en banc were granted, and the parties, and several amici curiae, including the federal government, several "hazardous waste generators," the AIA, and several other insurers, filed supplemental briefs.

For reversal the state argues that (1) the district court erroneously held "property damage" did not occur until the federal and state governments actually incurred cleanup costs; (2) the plain meaning of the policy term "damages" includes "equitable" monetary relief such as cleanup costs or, alternatively, the policy term "damages" is ambiguous and should be construed against the insurer to include payment of cleanup costs; (3) cleanup costs are merely a measurement of "damages" for "property damage," and the characterization of cleanup costs as equitable for purposes of seventh amendment analysis is inapplicable to questions involving insurance coverage; and (4) finally, the public interest in mitigating environmental pollution and cleaning up hazardous waste sites strongly supports imposing liability for the cleanup costs on the polluters and their insurers. The state also argues that, although it is not necessary to reach the "trigger" of coverage issue on appeal, if the court reaches that issue, Missouri courts would adopt the "injury-in-fact" theory, not the "exposure" theory.

Continental argues that (1) the district court correctly held that "property damage" did not occur until the federal and state governments actually incurred cleanup costs; (2) cleanup costs are equitable costs, not legal "damages," and thus are not recoverable under the

CGL policies; and (3) cleanup costs constitute economic losses, not "property damage," and thus are not recoverable under the CGL policies. Continental agrees with the state that it was not necessary to reach the "trigger" of coverage issue, but argues that if the court reaches that issue, there was no "occurrence" of property damage within the policy periods because cleanup costs were not incurred until sometime in 1980 at the earliest.

The amici curiae have advanced similar arguments. The federal government filed an amicus brief in support of the state, arguing that (1) for purposes of insurance coverage, "property damage" occurs at the time of injury or physical damage to the property itself, not at the time cleanup costs are incurred, and (2) under Missouri law cleanup costs are "damages" which NEPACCO is legally obligated to pay because of "property damage." Several "hazardous waste generators" also filed an amicus brief in support of the state, arguing that insurers are liable for cleanup costs because such costs are "damages." The AIA and several London insurance underwriters filed amicus briefs in support of Continental, arguing that, under the CGL policies in question, (1) cleanup costs are not legal "damages" and (2) cleanup costs constitute only economic losses, not "property damage."

The dispositive issue is whether the term "damages" in the standard-form CGL policy includes cleanup costs. We need not reach the other issues raised on appeal, such as whether environment contamination caused by improper disposal of hazardous wastes constitutes "property damage" or whether Missouri would adopt the "exposure" theory of coverage. However, we agree that environmental contamination caused by improper disposal of hazardous wastes can constitute "property damage." *See Port of*

Portland v. Water Quality Insurance Syndicate, 796 F.2d 1188, 1195-96 (9th Cir. 1986) (oil pollution of water constitutes damage to tangible property); *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 433 (D. Md.) (holding toxic waste dumps that contaminate the environment cause "property damage"; also distinguishing "property damage" from "damages"), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3368 (U.S. Nov. 2, 1987) (No. 87-744); *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520, 524 (Ch. Div. 1975) (oil spill into water caused damage to identifiable physical property), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977); *Kutsher's Country Club Corp. v. Lincoln Insurance Co.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136, 139 (Sup. Ct. 1983) (oil spill into water constituted property damage). *But see Mraz v. Canadian Universal Insurance Co.*, 804 F.2d 1325, 1328-29 (4th Cir. 1986) (governmental claims for cleanup costs are not claims for damages due to "property damage"), *rev'g Mraz v. American Universal Insurance Co.*, 616 F. Supp. 1173, 1177 (D. Md. 1985).

We also agree that Missouri would probably adopt the "exposure" theory of coverage. *See, e.g., Hawkeye-Security Insurance Co. v. Iowa National Mutual Insurance Co.*, 567 S.W.2d 719, 720 (Mo. Ct. App. 1978), *citing Kirchner v. Hartford Accident & Indemnity Co.*, 440 S.W.2d 751 (Mo. Ct. App. 1969); *Kissel v. Aetna Casualty & Surety Co.*, 380 S.W.2d 497, 509 (Mo. Ct. App. 1964). However, application of either the "exposure" or "injury-in-fact" theory of coverage would make little difference because of the specific facts presented in the *EPA* and *IPC* cases. *Cf. Abex Corp. v. Maryland Casualty Co.*, 252 U.S. App. D.C. 297, 790 F.2d 119, 125 (1986) (asbestos tort

cases; following "injury-in-fact" theory adopted in *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 748 F.2d 760, 765 (2d Cir. 1984) (coverage triggered when injury actually occurs during policy period, whether or not diagnosable during policy period)). Under the specific facts presented, the crucial events—the improper disposal of the hazardous wastes (wrongful act), the release of hazardous wastes into the environment (exposure), the contamination of the environment (injury-in-fact)—all happened virtually simultaneously. For example, in the *EPA* case, the improper disposal of the hazardous wastes immediately resulted in their release into the environment in July 1971. Because by definition hazardous wastes are extremely harmful, there was clearly both "exposure" and "injury-in-fact" during the first policy period. In the *IPC* case the contaminated dirt was not used as landfill at the Minker/ Stout/ Romaine Creek site until 1974, and thus there was no exposure or injury-in-fact until after the expiration of the third policy period. *But cf. Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 523 F. Supp. 110 (D. Mass. 1981), *modified*, 682 F.2d 12, 17 (1st Cir. 1982) ("manifestation" theory; coverage triggered if asbestos-related disease became "reasonably capable of medical diagnosis" during policy period), *cert. denied*, 460 U.S. 1028 (1983).

As a threshold matter, the state argues that we should not consider the "damages" issue because it was raised by the AIA on appeal and was not raised by a party until Continental filed its supplemental brief for rehearing en banc. Ordinarily, we consider only issues argued in the briefs filed by the parties and not those argued in the briefs filed by interested nonparties. *See, e.g., Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861-62 (9th Cir. 1982). Nonetheless, we can consider issues not raised in

the briefs or in oral argument, particularly when substantial public interests are involved. *See, e.g., Consumers Union v. FPC*, 166 U.S. App. D.C. 276, 510 F.2d 656, 662 & nn.9-10 (1974) (per curiam on petition for rehearing).

The "damages" issue is properly before the court en banc. It was expressly raised by the AIA in its initial amicus brief, and the state responded to the AIA's argument in its reply brief. The "damages" issue was considered and discussed at length by the panel majority, 811 F.2d at 1187-89, and the panel dissent, *id.* at 1193-95, and in fact was the only point of significant disagreement between the majority and dissenting opinions. Moreover, the broad issue of the availability of liability insurance coverage under standard-form CGL policies for the costs of cleaning up hazardous waste sites is a question of substantial importance not only to liability insurers and their insureds, but to the public as well.

This case involves the construction of standard-form CGL insurance policies. "An insuring obligation is a contract, and coverage exists only if assumed by the terms of the policy." *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (*Hanna*). The district court correctly applied the law of Missouri, the forum state. *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Missouri has adopted the most significant relationship test set forth in the Restatement (Second) Conflict of Laws § 188 (1971). *See American Institute of Marketing Systems, Inc. v. Brooks*, 469 S.W.2d 932 (Mo. Ct. App. 1971) (contracts), and is the state with the most significant contacts with the parties and the CGL policies. *See, e.g., Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1267-68 (8th Cir.), *cert. denied*, 421 U.S. 999 (1975).

Under Missouri law

> [t]he rules of construction applicable to insurance contracts require that the language used be given its plain meaning. If the language is unambiguous the policy must be enforced according to such language. If the language is ambiguous it will be construed against the insurer. Language is ambiguous if it is reasonably open to different constructions; and language used will be viewed in light of "the meaning that would ordinarily be understood by the lay[person] who bought and paid for the policy."

Robin v. Blue Cross Hospital Service, Inc., 637 S.W.2d 695, 698 (Mo. 1982) (banc) (citations omitted); *see also Pearce v. General American Life Insurance Co.*, 637 F.2d 536, 539 (8th Cir. 1980) (Missouri law); *Bellamy v. Pacific Mutual Life Insurance Co.*, 651 S.W.2d 490, 495-96 (Mo. 1983) (banc).

Case law on this issue is sharply divided. *Compare Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352-55 (under Maryland law, holding "damages" does not cover cleanup costs; citing cases), *with New Castle County v. Hartford Accident & Indemnity Co.*, No. 85-436, slip op. at 13-17 (D. Del. Nov. 2, 1987) (under Delaware law, holding "damages" covers cleanup costs; citing cases). For the reasons discussed below, we hold that the term "damages" is not ambiguous in the insurance context and that the plain meaning of the term "damages" used in the CGL policies refers to legal damages and does not cover cleanup costs.

Viewed outside the insurance context, the term "damages" is ambiguous: it is reasonably open to different constructions. Webster's Third New International Dic-

tionary 571 (1971) defines "damages" as "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for wrong or injury caused by a violation of a legal right." The dictionary definition does not distinguish between legal damages and equitable monetary relief. *E.g., New Castle County v. Hartford Accident & Indemnity Co.*, No. 85-436, slip op. at 16. Thus, from the viewpoint of the lay insured, the term "damages" could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses.

In the insurance context, however, the term "damages" is not ambiguous, and the plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief. *See Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352. The CGL policies require Continental to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies caused by an occurrence." (Emphasis added.) "The obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law." *Hanna*, 224 F.2d at 503. Although not defined in the CGL policies, "[t]he word 'damages' is not ambiguous in the insurance context. Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. at 432, *citing Haines v. St. Paul Fire & Marine Insurance Co.*, 428 F. Supp. 435, 439-41 (D. Md. 1977) (applying Maryland law), *Hanna*, 224 F.2d at 503-04, *and Descrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99

(1954). *But see, e.g., New Castle County v. Hartford Accident & Indemnity Co.*, No. 85-436, slip op. at 13-17 (applying Delaware law; citing cases); *United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843 (1983); *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76, 82-83 (App. Div. 1987) (citing cases).

This limited construction of the term "damages" is consistent with the provision defining the insurer's obligation as a whole. Continental did not agree to pay "*all sums* which the insured shall become legally obligated to pay." Continental agreed to pay "all sums which the insured shall become legally obligated to pay *as damages*." The expansive reading of the term "damages" urged by the state would render the term "all sums" virtually meaningless. "If the term 'damages' is given the broad, boundless connotations sought by the [insured], then the term 'damages' in the contract . . . would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase 'to pay as damages' would be obliterated." *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352.

Such a limited construction of the term "damages" is also consistent with the distinction drawn in insurance law between money damages and injunctive relief. "Traditionally, courts have found no insurance coverage for the costs of complying with an injunction even in cases where the suits could have been brought for damages." *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. at 434. *See also Hanna*, 224 F.2d at 503-04; *Garden Sanctuary, Inc. v. Insurance Co. of North America*, 292 So. 2d 75, 77-78 (Fla. Ct. App. 1974); *Ladd Construction Co. v. Insurance*

Co. of North America, 73 Ill. App. 3d 43, 29 Ill. Dec. 305, 307-08, 391 N.E.2d 568, 570-73 (1979).

The limited construction of the term "damages" is also consistent with the statutory scheme of CERCLA §107(a)(4), 42 U.S.C. §9607(a)(4), which differentiates between cleanup costs and damages. Under CERCLA cleanup costs are not substantially equivalent to compensatory damages for injury to or destruction of the environment. Some cases have overlooked the difference between recovery of cleanup costs under CERCLA § 107(a)(4)(A) (by governments), (B) (by "any other person"), 42 U.S.C. § 9607(a)(4)(A), (B), and recovery of damages for injury, destruction or loss of natural resources under CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C). For example, in *United States Aviex Co. v. Travelers Insurance Co.*, 336 N.W.2d at 843 (citations omitted), the court was persuaded that the distinction between recovery of cleanup costs and recovery of damages for damage to natural resources was "merely fortuitous from the standpoint of either [the insured] or [the insurer]." The court reasoned that whether the government chooses to cleanup the pollution itself and then sue to recover its cleanup costs, or sues to recover damages for the damage to natural resources, "[t]he damage to the natural resources is simply measured in the cost to restore the [environment] to its original state," and rejected the argument that the term "damages" should be limited to legal damages and should not include equitable costs. *Id.*

Moreover, the distinction between recovery of cleanup costs and recovery of damages is not "merely fortuitous" to either the insured as a CERCLA and RCRA defendant or to the insurer. The cost of cleaning up a hazardous waste site often exceeds its original value. On the other

hand, some natural resources are of exceptional value and their destruction could greatly exceed the cost of cleaning up any hazardous waste contamination. A significant difference between the measurement of liability for cleanup costs and for damage to natural resources could determine whether the government sues for cleanup costs or for damages. *See Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1353, *citing Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) (restoration of strip-mined land cost four times its potential value), *cert. denied*, 375 U.S. 906 (1963); *cf. Jack L. Baker Cos. v. Pasley Manufacturing & Distributing Co.*, 413 S.W.2d 268, 273-74 (Mo. 1967) (under Missouri law, measure of damages to real property is lesser of either difference in value before and after injury or cost of restoring property to original condition).

Whether the government seeks recovery of cleanup costs, damages for destruction or loss of natural resources, or both, may make little difference to the insured as a CERCLA or RCRA defendant. As noted above, there may be little difference between the *dollar amount* the insured may have to pay as cleanup costs under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), and the *dollar amount* the insured may have to pay as damages under CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C). Nonetheless, the type of relief sought is critical to the insured and the insurer, because under the CGL policies the insurer is liable only for legal damages, not for equitable monetary relief, such as cleanup costs. "The insurance contract, which controls the obligations between the parties and therefore centers the focus of this court, is written in terms of the relief sought . . . ." *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352. Here, the federal and state governments seek recovery of cleanup costs under

CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (costs of removal or remedial action), and RCRA § 7003 (a), 42 U.S.C. § 6973(a) (abatement costs). These lawsuits are essentially equitable actions for monetary relief in the form of restitution or reimbursement of costs. *See Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352-53; *cf. EPA*, 810 F.2d at 749 (for purposes of determining seventh amendment jury trial issue; cases cited). The federal and state governments have not sought recovery of "damages for injury to, destruction of, or loss of natural resources," pursuant to CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C).

Accordingly, we hold that the federal and state governments' claims for cleanup costs under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), and RCRA § 7003(a), 42 U.S.C. § 6973(a), are not claims for "damages" under these CGL policies.

The issues in the *Capstick* litigation require additional factfinding and analysis and are therefore unsuitable for summary disposition. The private individuals in *Capstick* seek, in part, recovery of damages for personal injury and property damage due to the improper disposal of hazardous wastes. *Cf.* CERCLA § 107(a)(4)(C) (damages for damage to natural resources), 42 U.S.C. § 9607(a)(4)(C). These claims are claims for "damages," not cleanup costs, and are covered within the terms of the CGL policies. We express no opinion on the issue of the insurer's liability for claims for damages under the CGL policies.

The order of the district court is affirmed.

HEANEY, Circuit Judge, with whom LAY, Chief Judge, and FAGG, Circuit Judge, join, concurring and dissenting.

The majority opinion appears to be consistent with the panel opinion of this Court, *Continental Ins. Co. v. Northeastern Pharmaceutical and Chem. Co.*, 811 F.2d 1180, 1189 (8th Cir. 1987), in all respects, save one. The panel held that under Missouri law the term "damages" in the standard-form comprehensive general liability (CGL) policy includes clean-up costs. *Id.* at 1189. The majority now disregards established Missouri law and holds to the contrary.

We all agree that the question whether clean-up costs are "damages" within the meaning of a CGL policy is an issue of Missouri law. We also agree that under Missouri law:

> The rules of construction applicable to insurance contracts require that the language used be given its plain meaning. If the language is unambiguous the policy must be enforced according to such language. *If the language is ambiguous it will be construed against the insurer. Language is ambiguous if it is reasonably open to different constructions; and language used will be viewed in light of "the meaning that would ordinarily be understood by the layman who bought and paid for the policy."*

Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695, 698 (Mo. 1982) (en banc) (citations omitted) (quoting *Stafford v. Travelers Ins. Co.*, 530 S.W.2d 23, 25 (Mo. Ct. App. 1975)).

Indeed, as this Court has pointed out, Missouri courts:

> do not necessarily accept the construction accorded to policy terms by astute insurance specialists or perspicacious counsel but rather are concerned with the meaning which the ordinary insured of average intelligence and common understanding reasonably would give to the words or language under consideration.

McMichael v. American Ins. Co., 351 F.2d 665, 669 (8th Cir. 1965) (quoting *Hammontree v. Central Mut. Ins. Co.*, 385 S.W.2d 661, 666-67 (Mo. Ct. App. 1965)).

The majority concedes on page 16:

> [F]rom the viewpoint of the lay insured, the term "damages" could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses.

Majority opinion at 16.

This concession should be dispositive. The Missouri court en banc has unequivocally held that the language of an insurance policy must be viewed in the light of the meaning that would ordinarily be understood by the *lay person* who bought and paid for the policy. *Robin*, 637 S.W.2d at 698.

The CGL policy does not define "damages." If the insurer wished to use a technical legal meaning for that term which differed from the accepted dictionary definition, it should have explicitly done so. Thus, to the extent the word "damages" is open to different constructions, it must be accorded the meaning ordinarily given it by the lay person who bought and paid for the policy.

Not surprisingly, the majority cites no Missouri case under which this Court may ignore the lay definition of "damages" and substitute in its place a "technical insurance" definition. Instead, the majority rejects the dictionary definition of "damages" on the ground that in the insurance context the word has a technical meaning which does not include the cost of restoring real property to the pre-damage condition. While this may be justified under the law of some states, it certainly is not under Missouri law. The legal definition of "damages" under Missouri law, assuming we were free to recognize that definition, includes the cost of restoring real property to its pre-damaged condition. *Jack L. Baker Companies, Inc. v. Pasley Mfg. and Distribut. Co.*, 413 S.W.2d 268, 273 (Mo. 1967).

The majority finally argues that black letter insurance law holds that claims for equitable relief "are not claims for "damages" under liability insurance contracts. It cites *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 432 (D. Md. 1987) (citing *Haines v. St. Paul Fire & Marine Insurance Co.*, 428 F. Supp. 435, 439-41 (D. Md. 1977) (applying Maryland law); *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d 499, 503-04 (5th Cir. 1955); and *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (1954)), in support of this proposition. Then, with the candor that one expects from one's colleagues, the majority cites a number of cases to the contrary: *New Castle County v. Hartford Accident & Indemn. Co.*, 673 F. Supp. 1359 (D. Del. 1987) (applying Delaware law); *United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843 (1983); *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76, 82-83

(App. Div. 1987) (citing cases). In view of the clear conflict, we doubt that the term "black letter law" is appropriate.[1]

The majority places great reliance on *Aetna Casualty and Surety Company v. Hanna*, 224 F.2d 499 (5th Cir. 1955). The case is of doubtful applicability. It simply holds that under *Florida law* an insurance company cannot be required to defend an action in equity seeking an injunction to prevent the insured from allowing continuing deposits of boulders, trash and dirt on another's land. It did not decide whether the insurer would have been required to reimburse the insured if a judgment for damages had been rendered. In so holding, the Fifth Circuit noted that in Florida the measure of damages is the difference in the property value before and after a trespass. In the case before the Fifth Circuit, the Court found no evidence of a dimunition in value as a result of the trespass. Thus, the sole meaningful remedy available was injunctive relief. *See Id.* at 503.

Missouri has not adopted this inflexible rule. It rather permits a plaintiff to recover, as damages, the cost of restoring real property to its pre-damaged condition. *Jack L. Baker*, 413 S.W.2d at 273.

The majority concludes that because state courts are divided on the question of whether recovery may be had from an insurance company for the cost of restoring property, it is free to choose what it feels is the better rule. The fact of the matter, however, is that the Missouri courts have clearly held that the cost of restoring real property

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1. "Black letter law" is "an informal term indicating the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction." Black's Law Dictionary 154 (5th ed. 1979).

is the proper measure of damages where the cost of clean-up does not exceed the value of the property interest damaged. *Id.*

Here, there is no doubt that the cost of cleaning up and abating environmental damage at the Denny farm site is less than the value of the damage to the government's property interest in the environmental resources damaged. Thus, *Baker* controls. (Moreover, were there any doubt on this issue, we should remand to the district court for a determination of the issue.)

The majority is also clearly in error when it states that the limited construction that it gives to the term "damages" is consistent with the statutory scheme of CERCLA, § 107(a)(4), 42 U.S.C. § 9607(a)(4). In so holding, it relies on *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 56 L.W. 3460 (Jan. 11, 1988). There, the Fourth Circuit stated:

> Judicial decisions, although not rejecting the rule of construction that terms of an insurance contract are to be given their ordinary meaning, have nevertheless limited the breadth of the definition of "damages" somewhat more narrowly than the appellant suggests. "Damages," as distinguished from claims for injunctive or restitutionary relief, includes "only payments to third persons when those persons have a legal claim for damages. . . ." *Aetna Casualty and Surety Company v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955). *See also Desrochers v. New York Casualty Company*, 99 N.H. 129, 106 A.2d 196 (1954). Thus "damages" is to be construed in consonance with its "accepted technical meaning in law." *Hanna*, 224 F.2d at 503. Maryland law, which governs the construction of this agreement,

> has similarly adopted the somewhat narrow, technical definition of damages.

Id. at 1352.

It is clear that reliance on *Armco* is misplaced because Maryland law is inconsistent with established Missouri law. Under Maryland law, the term " 'damages' is to be construed in consonance with its" somewhat narrow technical definition of "damages". *Id.* In Missouri, on the other hand, we must accord the term the meaning that lay persons would give it.[2]

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2. It is an interesting sidelight to this case that in applying Maryland law and finding for the insurer, the *Armco* court noted another action involving damage to property in the same vicinity as that involved in his case. In that action, Judge Scott O. Wright of he United States District Court for the Western District of Missouri appointed a special master, Professor Robert H. Freilich, of the University of Missouri at Kansas City, to help resolve the litigation. *See Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 432-33 (D. Md. 1986) (citing *United States v. Conservation Chem. Co.*, 653 F. Supp. 152 (W.D. Mo. 1986). After hearing the matter, Freilich stated that *the government's complaint (similar to the complaint in this case) alleged "damages" for purposes of a comprehensive general liability policy.* Judge Wright entered an order adopting the special master's recommendation, thus indicating his view as to the proper interpretation of the term "damages" in a comprehensive general liability policy such as the one at issue in this case. The Maryland court, in adopting a narrow technical definition of the term damages, noted that Judge Wright's order was vacated as to Maryland Casualty and two other insurers because they had entered into a settlement before the order was entered. *Id.* at 432.

More recently, the view of the Maryland court has been criticized. In *United States Fidelity and Guaranty Co. v. Thomas Solvent Co.*, No. K85-415 slip op. (W.D. Mich. Jan. 15, 1988) the court stated:

> *Maryland Casualty* rejected the recommendation of the special master who suggested—in my view—a more reasonable view of property damage from the standpoint of the insured. It is clear to me that once property damage is found as a result of environmental contamination, clean-up

(Continued on following page)

CONCLUSION

A close reading of the cases cited by the majority in support of its view as to the meaning of the term "damages" reveals that they all apply the law of a state which has adopted a restrictive definition of the term "damages." On the other hand, the cases applying state law requiring the words in an insurance policy to be given their ordinary, non-technical meaning support the position of this dissent. *See Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188 (9th Cir. 1986); *New Castle v. Hartford Accident and Indemnity Company*, 673 F. Supp. 1359 (D. Del. 1987); *Consolidated Rail Corp. v. Certain Underwriters at Lloyds*, Civ. No. 84-2609 (E.D. Pa. June 5, 1986) (unreported decision available on Westlaw at 1986 WL 6547); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987); *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 654 F. Supp. 1334 (D. D.C. 1986), *reconsideration in part denied*, 674 F. Supp. 354 (1987); *CPS Chem. Co. v. Continental Ins. Co.*, No. A-3799-86TS (N.J. Super. Ct. App. Div. Jan. 15, 1988); *Broadwell Realty Services, Inc. v. Fidelity & Casualty*

Footnote continued—

> costs should be recoverable as sums that the insured was liable to pay as a result of property damage. In this context the argument concerning the historical separation of damages and equity is not convincing and it seems to me that the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing him to pay sums of money because his acts or omissions affected adversely the rights of third parties. * * * The short answer is that from the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control.

Id. at 55.

Co., 218 N.J. Super. 516, 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987); *City of Thief River Falls v. United Fire & Casualty Co.*, 336 N.W.2d 274 (Minn. 1983); *Seaboard Surety Co. v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 81 Wash.2d 740, 504 P.2d 1139 (1973). Because Missouri law is clear that words in an insurance policy are to be given their ordinary meaning, we are obligated to do the same.

Accordingly, we would adhere to the panel opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(Filed January 22, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1940

Continental Insurance Companies,
Appellee,

v.

Northeastern Pharmaceutical and Chemical Company, Inc., Milton Turkel, Edwin B. Michaels and John W. Lee,
Appellees,

State of Missouri,
Intervenor-Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 15, 1986
Filed: January 22, 1987

Before HEANEY and McMILLIAN, Circuit Judges, and MURPHY*, District Judge.

HEANEY, Circuit Judge.

This appeal raises the question of whether hazardous waste cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act, 42

*The Honorable DIANA E. MURPHY, United States District Judge for the District of Minnesota, sitting by designation.

U.S.C. §§ 9601-9657 (1982) (CERCLA) are recoverable under a liability policy that covers "property damage" that "occurs" during the life of the policy, where disposal and environmental contamination took place during the policy period but cleanup costs were incurred later. We reverse the district court's order on Count I of Continental's complaint, affirm its dismissal of the State of Missouri's counterclaim, and hold that state and federal governments suffer "property damage" at the time hazardous wastes are improperly "released" into their environment and that cleanup costs are a recoverable measure of damages for this environmental property damage. We also affirm the district court's dismissal without prejudice of Count II of Continental Insurance Company's complaint relating to coverage for private individuals' personal and property damage due to improper hazardous waste disposal.

I. FACTS.

From 1970 to 1972, the Northeastern Pharmaceutical and Chemical Company (NEPACCO) produced hexachlorophene at a chemical plant in Verona, Missouri. The process produced a variety of wastes, among which was dioxin, a highly toxic chemical. In July, 1971, NEPACCO made arrangements to dispose of at least eighty-five fifty-five-gallon drums of these wastes in a trench on a farm near Verona, Missouri (the "Denny farm" site). When the deteriorated drums were dumped in the trench in July, 1971, a "strong odor" shortly emerged, persisting for several months. *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 828-30 (W.D. Mo. 1984). Later in 1971 or 1972, NEPACCO hired Independent Petrochemical Corporation (IPC) which, in turn, hired Russell Bliss to dispose of more dioxin-contaminated wastes. In

1971, 1972, and 1973, Bliss allegedly spread thousands of gallons of these wastes on the premises of the Bubbling Springs Stables in Fenton, Missouri, and on the roads of Times Beach, Missouri.[1] Later, in 1974, a Mr. Minker purchased twenty truckloads of contaminated dirt from the Bubbling Springs Ranch and used it as landfill on his property at West Rock Creek Road, Missouri (the "Minker/Stout/Romaine Creek" site).

During the two-year period from 1970 to 1972 that NEPACCO was in business, it was insured under a Comprehensive General Liability Policy (CGL),[2] issued by Continental. Three somewhat different policies were in effect from August 5, 1970, to August 5, 1971; August 5, 1971, to August 5, 1972; and August 5, 1972, to November 5, 1972.[3] Each policy requires Continental to:

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1. Times Beach was a town of approximately 2,200 people located twenty-five miles southwest of St. Louis. Soil samples taken there by the EPA in the early 1980's revealed soil dioxin levels in excess of one hundred times the Center for Disease Control's recommended maximum soil dioxin level for residential areas. In February, 1983, the EPA announced that the government would purchase the entire town of Times Beach using $33.7 million from the federal Superfund. The State of Missouri contributed an additional $3.3 million to the buy-out.

2. The drafting history and background of the standard-form CGL policy is discussed in *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500-03 (S.D. N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984).

3. The latter two policies, covering the period August 5, 1971, to November 17, 1972, contain the following "pollution and contamination" exclusion clause:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

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pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of A. bodily injury or B. property damage[4] to which this insurance applies caused by an occurrence,[5] and the Company shall have the right and

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Footnote continued—

The United States Court of Appeals for the First Circuit has held that coverage for damages caused by hazardous wastes improperly disposed of by the plaintiff in the regular course of its business is excluded by the same "pollution exclusion" clause. *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984); *see also Travelers Indemn. Co. v. Dingwell*, 414 A.2d 220 (Me. 1980). Other courts have reached the opposite conclusion where the hazardous waste discharge was sudden or accidental or the wastes were negligently disposed of by a third-party contractor or were disposed of in full compliance with all applicable rules and regulations, or the wastes were generated other than in the regular course of the insured's business. *See, e.g., Payne v. United States Fid. and Guar. Co.*, 625 F. Supp. 1189 (S.D. Fla. 1985); *Technicon Electronics Corp. v. American Home Assurance Co.*, No. 08811/85 (N.Y. Sup. Ct. Feb. 13, 1986); *Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (Ohio Ct. App. 1984); *Niagara County v. Utica Mutual Ins. Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (N.Y. App. Div.), *mot. for lv. to app. dism.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981); *Lansco, Inc. v. Department of Envtl. Protection*, 138 N.J. Super. 275, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 520 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977). Whether the "pollution exclusion" clause excludes coverage in this case is not at issue on appeal because the district court found a lack of coverage on other grounds.

4. All three policies define "property damage" as follows:

> (1) Physical injury or destruction of tangible property which occurs during the policy period, including the loss of use thereof at anytime resulting therefrom,
>
> (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period * * *.

5. All three policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, injury or property damage neither expected nor intended from the standpoint of the insured." Several courts have held that the discharge of hazardous wastes is an "occurrence" within this type

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duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage.

All three provide that: "[t]his insurance applies only to bodily injury or property damage which occurs during the policy period."

In 1980, the EPA investigated the Denny farm site and found that the NEPACCO wastes in the trench and underlying soil contained "alarming[ly] high concentrations of dioxin." *Id.* at 831. It cleaned up the site, and then sought to recover its costs through a lawsuit against NEPACCO and others. *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823 (the *"EPA"* suit). The district court found NEPACCO and the other defendants jointly and severally liable under CERCLA for the cost of the cleanup.[6] A separate appeal in that action is now pending before another panel of this Court.

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of provision where the discharge or the extent of the damage was not expected or intended. *See, e.g., Mraz v. American Universal Ins. Co.*, 616 F. Supp. 1173, 1177-78 (D. Md. 1985), *appeal docketed*, No. 85-2399 (4th Cir., Dec. 27, 1985); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 388 (D. Md. 1978); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, 380 (1986); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 489 A.2d 1265, 1269 (N.J. Super. Ct. Law Div. 1984), *rev'd and remanded on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985); *Buckeye Union Ins. Co.*, 477 N.E.2d at 1233. *But see American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549 (E.D. Mich. 1984). This is not an issue on this appeal because the district court found a lack of coverage on other grounds.

6. The district court entered judgment in favor of the EPA for $155,171.93. Although the court noted that the stored wastes at the Denny farm site no longer present an imminent and substantial danger to health and environment, 579 F. Supp. at 832, the waste necessitates future monitoring and further response costs for which NEPACCO and the other defendants remain liable. *Id.* at 852-53.

On March 7, 1983, a number of former residents of Times Beach and Imperial, Missouri, filed an action against NEPACCO and others which seeks recovery for personal injuries and property damage allegedly caused by the dumping of NEPACCO's wastes at the Minker/Stout/Romaine Creek site and on the streets of Times Beach. *Capstick v. Independent Petrochemical Corp.*, No. 832-0453 (Cir. Ct., City of St. Louis, Mo. filed Mar. 7, 1983) (the "*Capstick*" suit).

To protect against potential liability arising out of its status as insurance carrier for NEPACCO during the time NEPACCO's hazardous wastes were improperly disposed of, Continental filed this action against NEPACCO and its former officers and directors. Count I seeks a declaration that Continental is under no duty to defend or indemnify NEPACCO for liability arising out of the *EPA*[7] suit. Count II seeks the same declaration with respect to the *Capstick* suit. On November 14, 1984, Continental moved for summary judgment. NEPACCO and the other defendants failed to enter an appearance or file an answer.[8]

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7. On February 25, 1985, the United States filed a garnishment action seeking to collect from Continental, as NEPACCO's liability insurer, the sums awarded in the underlying *EPA* suit. *United States v. Continental Ins. Co.*, No. 85-3069-CV-S-4 (W.D. Mo. filed Feb. 25, 1985). The district court initially entered judgment in favor of Continental based on its judgment in the present action, *Continental v. NEPACCO*, No. 84-5034-CV-S-4 (W.D. Mo. filed June 25, 1985), then granted the United States's motion for reconsideration. Continental then moved for summary judgment, and resolution of this motion has been held in abeyance until the appeal in the *EPA* suit, 579 F. Supp. 823 is resolved.

8. NEPACCO's corporate charter was forfeited by the Delaware Secretary of State in August, 1976. NEPACCO never filed a formal certificate of dissolution, but in 1974, its assets were

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The State of Missouri was then granted leave to intervene to protect its interests arising out of claims that it had made against NEPACCO and the other defendants in a third hazardous-waste lawsuit filed in the United States District Court for the Eastern District of Missouri. *Missouri v. Independent Petrochemical Corp.*, No. 83-3670 (E.D. Mo. filed Nov. 23, 1983) (the "*IPC*" suit). The complaint in *IPC* alleges that NEPACCO, its officers, and others are liable under CERCLA for costs incurred by the state in excavating and removing dioxin-contaminated soil from the Minker/Stout/Romaine Creek site. The state filed an answer to Continental's complaint and a counterclaim alleging that Continental is obligated to indemnify the state for the amount of any judgment imposed on NEPACCO in the underlying *IPC* lawsuit.

On June 25, 1985, the district court granted summary judgment to Continental on Count I of its complaint (no insurance coverage for the *EPA* claims), and against the state on its counterclaim (no coverage for the *IPC* claims). The court reasoned that the cleanup costs sought by the United States and the state in the *EPA* and *IPC* suits are not "property damage" as that term is defined in the CGL policies and that "no * * * damages were incurred by the government entities during the policies' effective dates" because the policies were only in effect from 1970 to 1972, and the cleanup costs were incurred later. The court also granted Continental's motion to dismiss without prejudice Count II of its complaint (the

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liquidated and the proceeds distributed to shareholders after payment of outstanding debts. *See United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 827 (W.D. Mo. 1984). Thus, at the time Continental filed its complaint, NEPACCO had been a defunct or "shell" corporation for some ten years.

Capstick claims), stating that "more specific findings of bodily injury and property damage" were needed first. The State of Missouri appeals.[9]

II. DISCUSSION.

A. *EPA and IPC Claims.*

The first issue is whether the district court erred in holding that cleanup costs under CERCLA are not "property damage" as defined in the CGL policies.[10] Although the district court cited no case and gave no explanation for its holding, Continental and amicus AIA advance two arguments in support.

Continental argues that only the actual owners of the land on which hazardous wastes are improperly disposed of sustain "property damage," and that any injury suffered by governmental entities from the improper disposal is merely an economic injury.[11] We disagree.

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9. The United States and Armco, Inc., AT&T Technologies, Inc., FMC Corporation, and International Business Machines Corporation appear as amicus curiae in support of the state. The American Insurance Association (AIA) appears as amicus curiae in favor of Continental.

10. We agree with the district court that Missouri law governs the interpretation of the insurance policies at issue because that state has the most significant relation with the negotiation and terms of the insurance contract. *Havenfield Corp. v. H. R. Block, Inc.*, 509 F.2d 1263 (8th Cir.), *cert. denied*, 421 U.S. 999 (1975); *Ryder Truck Rental, Inc. v. U. S. Fid. and Guar. Co.*, 527 F. Supp. 666 (E.D. Mo. 1981); *National Starch & Chem. Corp. v. Newman*, 577 S.W.2d 99 (Mo. Ct. App. 1978).

11. Continental cites to *Giddings v. Industrial Indemn. Co.*, 112 Cal. App.3d 213, 219, 169 Cal. Rptr. 278, 281 (Cal. Ct. App. 1981), where the court stated that "strictly economic losses like lost profits, loss of goodwill, loss of anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy." *See also CMO Graphics, Inc. v. CNA Ins.*, 115 Ill. App.3d 491, 450 N.E.2d 860, 863-64 (Ill. App. Ct. 1983).

The Supreme Court of the United States has held that state and federal governments suffer injury to their "quasi-sovereign" interests when pollutants are released into the soil, water, and air within their jurisdiction. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 51 L.Ed.2d 1038, 1044 (1907) (state); *cf. Illinois v. City of Milwaukee*, 406 U.S. 91, 31 L.Ed.2d 712, 722-26 (1972) (federal). The question here is whether this injury to governmental "quasi-sovereign" interests constitutes "property damage" within the meaning of an insurance policy. Although the Supreme Court has not squarely confronted the issue, two thoughts expressed in cases decided by the Court lead us to reject Continental's argument. First, it has implied that an injury to a government's quasi-sovereign interest in natural resources is a form of property damage. Second, it has held that the government has power, in its quasi-sovereign capacity, to seek redress for the environmental property damage suffered by the actual owners of the land affected by pollution.

In *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 51 L.Ed. 1038, for example, the State of Georgia brought suit against certain Tennessee copper companies to enjoin the discharge of noxious gases over its territory. In holding that it had jurisdiction and that Georgia was entitled to an injunction, the Court stated:

> The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.

> It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a make-weight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.

51 L.Ed. at 1044.

The Court's discussion of a governmental interest in "title" to all the soil, water, and air within its jurisdiction suggests that the government has a property interest in natural resources. A similar implication arises from *Missouri v. Illinois*, 180 U.S. 208, 45 L.Ed. 497 (1901), where the Court held that Missouri was permitted to sue as *parens patriae* to enjoin the discharge of sewage from Chicago, Illinois into the Illinois and Mississippi rivers: "impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river * * * would injuriously affect the entire state." 45 L.Ed. at 512. The Court suggested that although a dispute between states over interstate waters may not involve "direct property rights" of a state, the injury to the state's "quasi-sovereign" rights is akin to an injury to state property rights.[12] *Id.* Furthermore, the Court stressed that in environmental damage suits, a state has the power to seek redress in court for the property damage caused to the general public. *Id.; see also Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 608 (1981)

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12. *See also, e.g., State v. Leavitt*, 105 Me. 76, 79, 72 A. 875, 877, 72 A. 875 (1909) (Each state's interest in the natural resources within its borders "is in fact a property right.").

(Rehnquist, J., dissenting on other grounds) (pointing out that when a state sues to advance its quasi-sovereign interests, it is not suing simply to protect the economic interests of its citizens). Similarly, in *Toomer v. Witsell*, 334 U.S. 385, 408, 68 S. Ct. 1156, 92 L.Ed. 1460 (1948), Mr. Justice Frankfurter, joined by Mr. Justice Jackson, concurring, stated:

> A state may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the state may for the common good exercise all the authority that technical ownership ordinarily confers.

This conclusion is supported by statements in a wide array of cases and statutes that state and federal governments have property interests in wildlife,[13] inter- and intra-state waters,[14] and natural resources in gen-

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13. *See, e.g., Geer v. Connecticut*, 161 U.S. 519 (1896) (State has property interest in and police power over wild game within its jurisdiction because of its sovereign capacity as representative of the people in their common ownership of wild game.); *State v. Taylor*, 358 Mo. 279, 214 S.W.2d 34, 36 (1948) (State has "property right" in wildlife of state.); Mo. Ann. Stat. § 252.030 (Vernon 1963) ("The ownership of and title to all wildlife of and within the state * * * are hereby declared to be in the State of Missouri."). The federal government would also seem to have a protectable interest in wildlife, an interest which might be characterized as a form of property right. *Cf. Missouri v. Holland*, 252 U.S. 416 (1920).

14. It has been generally stated that interstate navigable waters and their watersheds are "public property of the nation," *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 85 L.Ed. 1064, 1069 (1941), and that "waters of the state," *see* Mo. Ann. Stat. § 260.500(11) (Vernon 1963) (defining "waters of the state" as all rivers, streams, lakes and other bodies of water") are property of the state. *See McCready v. Virginia*, 94 U.S. 391, 394, 24 L.Ed. 248 (1876) ("The principle has long

(Continued on following page)

eral.[15] Moreover, state and federal governments have "direct property interests" in public land holdings which may be damaged by environmental contamination.

Footnote continued—

been settled in this Court, that each State owns the beds of all tide-waters within its jurisdiction. * * * In like manner, the states own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty.); *United States v. Turner*, 175 F.2d 644, 647 (9th Cir.), *cert. denied*, 338 U.S. 85 (1949) (State has property interest in intrastate navigable waters.); *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1100 (D. Me. 1973) (State has sufficient quasi-sovereign or property interest in its coastal waters and marine life to maintain suit for damages caused by oil spill.); *Maryland v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972) (State has "proprietary interest" in its waters and may recover damages for cost of cleaning up oil-spill damage to these waters.); *California v. S. S. Bournemouth*, 307 F. Supp. 922, 929, *clarified*, 318 F. Supp. 839 (C.D. Cal. 1970) (State suffers property damage when its waters are damaged by oil spill.); *Hickey v. Hazard*, 3 Mo. App. 480 (Mo. Ct. App. 1877) (State of Missouri has property interest in waters of the state.).

15. *See, e.g.*, Mo. Const., art. 4 § 12 (establishment of department of conservation and Department of Natural Resources); Mo. Ann. Stat. § 67.870-.910 (Vernon Supp. 1986) (open space conservation); Mo. Ann. Stat. § 253.010 (Vernon 1963) (state's interest in "land" includes "every estate, interest and right, legal or equitable, in land or water"); Mo. Ann. Stat. § 256.010 (Vernon 1963) (appointment of state geologist to survey state resources); Mo. Ann. Stat. § 260.435-.550 (Vernon Supp. 1986) (state's interest in preventing harm to property and people by abandoned hazardous waste dumps); Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (1982) (protection of "nation's air resources"); National Environmental Quality Act, 42 U.S.C.A. §§ 4321-4396 (1982) (protection of "nation's environment"); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982) (protection of "nation's waters"); CERCLA, *supra* (*see* 42 U.S.C. § 9601(16), which states: " 'natural resources' means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, or any foreign government."

In light of these extensive statements of governmental property interests in environmental resources, it does not seem unreasonable to assume that an insurance company, providing liability coverage for a chemical producer, would contemplate environmental damage as a form of covered "property damage for which governments may seek recovery." *See Lansco, Inc. v. Department of Envtl. Protection*, 138 N.J. Super. 275, 350 A.2d 520, 524-25 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977). The policies' definition of "property damage" as damage to "tangible property" or "physical injury" seems to contemplate damage to tangible property such as land, trees, air, and water. Supportive of this is the inclusion in the latter two of the three policies at issue of clauses generally excluding environmental damage from coverage for property damage. *See Port of Portland v. Water Quality Ins. Syndicate*, 549 F. Supp. 233, 235 (D. Ore. 1982) (The pollution exclusion clause "itself states that 'property damage' may result from the discharge of pollutants.").

Finally, all of the cases which have squarely considered Continental's argument have rejected it.[16] In *Mraz v. American Universal Ins. Co.*, 616 F. Supp. 1173

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16. The two cases cited by Continental are inapposite. In *Atlantic City Mun. Util. Auth. v. CIGNA*, No. A-1320-84TF (N.J. Super. Ct. App. Div. Dec. 19, 1985), the court held that costs incurred by a municipal water authority in drilling new wells and adding filtering devices to prevent *potential* contamination of its wells by nearby hazardous waste dumps are not recoverable under a CGL policy. In *Linda Walls v. Waste Resources Corp.*, No. 2-83-418 (E.D. Tenn. Oct. 11, 1983), the court adopted a magistrate's report suggesting distinction, for statute of limitations purposes, between suits for recovery of cleanup costs and suits claiming damages for injury to or loss of natural resources.

(D. Md. 1985), for example, the court rejected as "untenable" the insuror's claim that state and federal governments do not sustain "property damage" for insurance policy purposes when hazardous wastes are improperly disposed of and ultimately cleaned up by the government. A similar conclusion was reached in *Lansco*, 350 A.2d at 524-25, and *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc.2d 889, 465 N.Y.S.2d 136, 139 (N.Y. Sup. Ct. 1983).[17]

In sum, we agree with the position taken in *Mraz*, *Lansco*, and *Kutsher's* that the improper release of toxic wastes may cause "property damage" not only to the actual owner of the land, water, or air, but also to state and federal governments because of their "interest independent of and behind the titles of its citizens in all the earth and air within [their] domain." *Tennessee Copper Co.*, 51 L.Ed.2d at 1044.

Amicus AIA assumes, at least for purposes of argument, that environmental contamination may cause "property damage" for which state and federal governments may seek relief. However, it argues that while the governments might be able to recover for the diminution

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17. For other cases implicitly finding that cleanup costs are recoverable "property damage," *see, e.g., Mercury Refining Co. v. Hartford Fire Ins. Co.*, No. 84-CU-495 (N.D. N.Y. July 19, 1985); *Payne v. United States Fid. and Guar. Co.*, 625 F. Supp. 1189, 1193 (S.D. Fla. 1985); *Port of Portland*, 549 F. Supp. at 235; *Technicon Electronics Corp. v. American Home Assurance Co.*, No. 08811/85 (N.Y. Sup. Ct. Nov. 1, 1985); *Shapiro v. Public Service Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 477 N.E.2d 146, 154 (Mass. App. Ct. 1985); *Buckeye Union Ins. Co. v. Liberty Solvents and Chem.*, 17 Ohio App.3d 127, 477 N.E.2d 1227, 1239 (Ohio Ct. App. 1984); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 323 S.E.2d 726, 735 (N.C. Ct. App. 1984), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 489 A.2d 1265, 1269 (N.J. Super. Ct. Law Div. 1984).

in value of environmental resources, cleanup costs themselves are not recoverable. It bases this argument on the language of section 107 of CERCLA which provides:

> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or site selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

42 U.S.C. § 9607(a)(4).

A close reading of this section fails to support AIA's argument that only an action under the last subsection, section 9607(a)(4)(C), is an action for "property damage."[18] It seems clear to us that, although subsection (C) directly provides for recovery for damage to natural resources, subsections (A) and (B) are also measures of the damages which governmental entities may recoup for hazardous waste damage to natural resources. This

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18. The CERCLA claims in the *EPA* and *IPC* suits were brought solely under 42 U.S.C. § 9607(a)(4)(A) for cleanup costs.

conclusion is supported by all of the on-point cases cited by the parties or revealed by our independent research.[19] *See, e.g., Askew v. American Waterways Operators*, 411 U.S. 325, 36 L.Ed.2d 280, 286 (1973) (In discussing the Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. §§ 1161 *et seq.* (1972), and a similar Florida Act, the Court stated, "While the Federal Act determines damages measured by the cost to the United States for cleaning up oil spills, the damages specified in the Florida Act relate in part to the cost to the State of Florida in cleaning up the spillage."); *Riehl v. Travelers Ins. Co.*, 22 Env't Rep. Cas. (BNA) 1544, 1546 (W.D. Pa. Aug. 7, 1984), *rev'd on other grounds*, 772 F.2d 19 (3d Cir. 1985) (Measure of damages to ground water and streams caused by seepage of wastes from insured's landfill "is not precisely calculable but includes abatement costs relative to preventing further pollution."); *Port of Portland*, 549 F. Supp. at 235 (Cost of cleaning up oil spill is recoverable "property damage" under CGL policy.); *Chem. Application Co. v. Home Indem. Co.*, 425 F. Supp. 777, 778 (D. Mass. 1977) (Cleanup and removal expenses incurred by insured measure the "damages" for which indemnification is available.); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 323 S.E.2d 726, 735 (N.C. App. 1984), *rev'd on other grounds*, 315 N.C.

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19. On March 10, 1986, the United States Supreme Court in *Exxon Corp. v. Robert Hunt*, 106 S. Ct. 1103, 89 L.Ed.2d 364 (1986), held that the New Jersey Spill Compensation and Control Act's (N.J. Stat. Ann. §§ 58:10-23.11 to 58:10-23.112 (West 1982 and Supp. 1985) imposition of a "spill fund" tax on major petroleum and chemical facilities in the state is partially preempted by section 114(c) of CERCLA, 42 U.S.C. § 9614(c). Dicta in the opinion points both ways as to whether governmental cleanup costs may be considered "property damage." Given that the issues there have no relation to the issues here, we find this dicta not helpful in resolving the present case.

688, 340 S.E.2d 374 (1986) (Cleanup costs are "essentially compensatory damages for injury to common property," the ground water of the State of North Carolina.); *Kutsher's Country Club Corp.*, 465 N.Y.S.2d at 139 ("The cost of cleanup * * * is clearly reflective of the state's power to establish damages with respect to legislation designed to preserve the sovereign state's interest in the preservation of natural resources."); *Lansco, Inc. v. Department of of Envtl. Protection*, 350 A.2d at 525 (Measure of damages for pollution discharge in river is "the cost of eliminating the harmful substance from the waters of the state.").[20] *But cf. Atlantic City Mun. Util. Auth.*, No. A-1320-94TF (N.J. Super. Ct. App. Div. 1985); *Linda Walls*, No. 2-83-418 (E.D. Tenn. Oct. 11, 1983).

Finally, the language of the CGL policies at issue supports the view that cleanup costs are a measure of recoverable damages for injury to environmental resources. The language of the policies specifically require Continental to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay

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20. The Missouri Supreme Court's decision in *Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co.*, 413 S.W.2d 268 (Mo. 1967), suggests that Missouri would follow this majority view. There, the Court held that under Missouri law, damages in real property cases are calculated as either the difference in value before the injury and after, or the cost of restoring the real property to its original condition, whichever is the lesser. *Id.* at 273-74. Because the hazardous waste contamination alleged in the *EPA* and *IHC* suits spread widely from the originally contaminated property to other property and the groundwater of the state, it seems clear that the cost of cleaning up the contamination would be the lesser measure of damage. Moreover, although the Missouri courts have not squarely confronted the issue, the appropriate measure of damages in a case involving improper disposal of hazardous wastes may include both the cost of cleanup and the damages measured by the remaining diminution in the value of natural resources. In the case at hand, we are faced, however, only with the question of whether cleanup costs are recoverable.

as damages * * * because of property damage." This language suggests that once there is property damage—here, environmental contamination—then the damages that flow from that property damage—here, cleanup costs —are recoverable.[21]

In sum, the cases, the CGL policy language, the common meaning of "property damage," and section 107 of

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21. The state points out that this distinction between property damage and their compensatory damages is so well established it is set forth in Black's Law Dictionary (4th ed. 1951):

> Damage. Loss, injury or deterioration, caused by the negligence, design or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural,—"damages"—which means a compensation in money for a loss or damage.

Citation to meaning given ordinary language in a respected dictionary is particularly relevant in a case involving the construction of insurance policy terms because of the well-established principle that insurance policy language must be given the meaning that it would convey to an ordinary insured. *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695, 698 (Mo. 1982) (en banc). We agree with the state and supporting amici that an ordinary insured chemical company would read the term "property damage" to include environmental damage and would also conclude that the cost of cleaning up such damage is recoverable. Moreover, to the extent the term "property damage" is ambiguous as applied to environmental property damage, the ambiguities must be construed against the insurer and in favor of finding coverage for the insured. *See Hon v. Director, Office of Workers' Comp. Programs*, 699 F.2d 441, 443 (8th Cir. 1983); *Bellamy v. Pacific Mut. Life Ins. Co.*, 651 S.W.2d 490, 495-96 (Mo. 1983).

Additionally, the United States Supreme Court's decision in *St. Paul Fire and Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978), supports the state's claim that under an "occurrence" policy like that at issue here, only the property damage rather than the claim for compensation for this damage must occur during the policy period:

> An "occurrence" policy protects the policyholder from liability for any act done while the policy is in effect, whereas a "claims made" policy protects the holder only against claims made during the life of the policy.

Id. at 535.

CERCLA all support the governments' argument that cleanup costs under CERCLA are compensatory damages for "property damage" within the meaning of the CGL policies. Accordingly, we adopt this view.

The remaining issue is whether the district court erred in holding that the governments did not suffer an "occurrence" of property damage *during the policy period* because, although the improper waste disposal occurred during the policy period, the cleanup costs were not incurred until long after the policies expired.[22] We hold that it did and adopt the majority view that environmental damage occurs at the moment that hazardous wastes are improperly released[23] into the environment and that a liability policy in effect at the time this damage is caused provides coverage for the subsequently incurred costs of cleaning up the wastes.[24] In *Mraz*, 616 F. Supp. at 1179, for example, the court rejected the same argument made by the insurer here and held that further fact findings were called for on an allegation that "environmental damage began to take place immediately in 1969 upon dumping at the Leslie site creating the potential for liability within

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22. Under Missouri law, the time of an "occurrence" within the meaning of an indemnity policy is the time the loss or damage was sustained and not the time when the negligent or wrongful act was committed. *Hawkeye-Security Ins. Co. v. Iowa Nat'l Mut. Ins. Co.*, 567 S.W.2d 719, 720 (Mo. Ct. App. 1978).

23. CERCLA section 107, 42 U.S.C. § 9607, provides for liability under the Act whenever there is a "release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." 42 U.S.C. § 9601(22) states, in relevant part,

> "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment[.]

24. However, various other policy provisions and exclusions may exclude coverage, but these issues are not before us on this appeal.

the scope of the 1969 policy." A similar conclusion has been reached in numerous other cases. *See, e.g. Payne*, 625 F. Supp. at 1103 (Implicitly finding that improper disposal of hazardous wastes during policy period is an "occurrence" of "property damage" at the time of release into the environment.); *Mercury Refining Co. v. Hartford Fire Ins. Co.*, No. 84-CU-495, (N.D. N.Y. July 19, 1985) (same); *Riehl*, 22 Envtl. Rep. Cas. (BNA) at 1546, *rev'd and remanded on other grounds for further findings*, 772 F.2d 19 (3d Cir. 1985) (same); *Buckeye Union Ins. Co.*, 477 N.E.2d at 1233 (Insurer during the time period when hazardous wastes were "released" into surrounding soil and groundwater has duty to defend CERCLA cleanup suit under CGL policy.); *CPS Chem. Co.*, 489 A.2d at 1269 ("Time of discovery of the accident does not determine when [damage] took place. The complaint alleges damages commencing with the date of dumpings.").[25]

Quite similar to this line of decisions are cases involving insurance coverage for "progressive diseases" where exposure to a harmful substance occurred during the policy period but the disease or illness developed later after the policy expired. The majority of federal cases on this issue have found coverage by adopting the "exposure,"[26] or

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25. *See also Shapiro*, 477 N.E.2d at 149; *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820, 823-26 (Pa. Super. Ct. 1984). *Cf. Jackson Tp. Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990, 995 (N.J. Super. Ct. Law Div. 1982); *Waste Management of Carolinas*, 323 S.E.2d 726; *Port of Portland*, 549 F. Supp. at 233; *Kutsher's*, 465 N.Y.S.2d at 136; *Niagara County*, 439 N.Y.S.2d at 538.

26. *See, e.g., Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985); *Hancock Laboratories, Inc., v. Admiral Ins. Co.*, 777 F.2d 520, 524 (9th Cir. 1985); *Ducre v. Executive Officers of Halter Marine Co.*, 752 F.2d 976, 994 (5th Cir. 1985); *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1223 (6th Cir. 1980), *aff'd and clarified on reh'g*, 657 F.2d 816, *cert. denied*, 451 U.S. 1109 (1981) (Date of occurrence is the date on which the injury-producing agent first contacts the body.).

the "continuous exposure,"[27] theory of when injury occurs. These decisions rest on the view that exposure to the dangerous substance at issue during the policy period caused immediate, albeit undetectable, physical harm which ultimately led to disease or physical impairment after the expiration of the policy period. For example, in *Forty-Eight Insulations*, 633 F.2d at 1223, the Court, in finding coverage for a progressive disease which manifested itself after the policy period, stated, "We see nothing in the policy which requires that the underlying cause of action accrue within the policy period. There exists a clear distinction between when bodily injury occurs and when the bodily injury that has occurred becomes compensable." *Accord Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

These cases are distinguishable from cases where a negligent act was committed during the policy period but an accident or injury did not occur until after the policy expired.[28] For example, if one negligently fails to shovel

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27. *See, e.g., Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1047 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (Date of occurrence is the continuous period from exposure to manifestation.).

28. The case which the district court relied on, *Kirkham and Michael & Assoc., Inc. v. Travelers Indem. Co.*, 361 F. Supp. 189 (D. S.D. 1973), *aff'd*, 493 F.2d 475 (8th Cir. 1974), falls into this category. In *Kirkham*, an engineering corporation contracted with the City of Rapid City, South Dakota, to design, oversee the construction of, and to make a final inspection of a waste treatment plant for the city. Once the plant was finally inspected, turned over to the city, and set in operation, the city learned that the plant was "deficient" in several respects. The city sued the engineering firm and the firm's insurance carrier brought an action seeking a declaration that its policy during the construction period (later policies contained an exclusion for damages arising from professional malpractice/negligence suits) did not provide coverage. The insurer's argument was that, although

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snow off his sidewalk during the policy period, there is no compensable accident until and if someone slips and injures himself during the policy period. This distinction was discussed in *Mueller Fuel Oil Co. v. Insurance Co. of North America*, 95 N.J. Super. 564, 232 A.2d 168, 175 (N.J. Super. Ct. App. Div. 1967), a case involving insurance coverage for a claim of malicious prosecution, where the court wrote:

> The tort of negligence is not committed unless and until some damage is done. Therefore, the important time factor in determining insurance coverage where the basis of the claim is *negligence*, is the time when the damage has been suffered. In a claim based on malicious prosecution the damage begins to flow from the very commencement of the tortious conduct—the making of the criminal complaint. The wrong and damage are practically contemporaneous * * *.

Footnote continued—

the negligent construction and supervision occurred during the policy period, the city did not suffer damage until the plant was turned over to it and operation of the plant revealed its deficiencies. The district court agreed and held that there was no coverage and, thus, no duty to defend the firm in the city's suit. 361 F. Supp. at 193-94. This Court affirmed on the basis of the district court's opinion. 493 F.2d at 475. *Kirkham* is distinguishable from the present case in many respects. First of all, the factual situation is inapposite. Second, it is an example of a negligence case where the negligence was not accompanied by immediate damage or injury, as was the case in the above-cited hazardous waste and progressive disease cases. *See also Kissel v. Aetna Cas. & Sur. Co.*, 380 S.W.2d 497 (Mo. Ct. App. 1964) (Finding insurance coverage for damage manifested after policy lapsed because the act of negligence during the policy period was accompanied by immediate physical damage or injury.). Third, the city in *Kirkham* had no ownership interest in the sewage plant until it was turned over to it. It was only at that time, after the relevant policy lapsed, that the city was injured by learning that the plant did not work as projected.

It seems to us that in the case of improper hazardous waste disposal, the wrong and the resulting damage may also be practically contemporaneous.

The decision in *Kissel v. Aetna Cas. & Sur. Co.*, 380 S.W.2d 497 (Mo. Ct. App. 1964), is particularly relevant on the crucial question of how the Missouri courts would likely rule on the question of when property damage occurs for purposes of insurance coverage. In *Kissel*, a building contractor hired to build a school employed a subcontractor to dig the foundation and to do landscaping work. During the excavation work in 1952, a series of pressure cracks developed in the ground around the school. The cracks were filled in with dirt and the school construction and landscaping were completed in 1953. The contractor carried a comprehensive general liability policy which covered property damage done by itself and its subcontractors in the course of their construction work. The CGL policy expired in late 1952. In 1957, the cracks reappeared and spread to several pieces of property adjoining the school. Five owners of these pieces of property brought suit, and the construction company instituted suit seeking a declaration that the CGL policy in effect in 1952 covered the damage which occurred in 1957. The insurance carrier argued "that the accident in question occurred in 1957, and not during the policy period, which was November 1951 to November 1952. Under those circumstances, * * * it cannot be held responsible for the damages shown in evidence." 380 S.W. 2d at 507. The court rejected this contention, noting that there was not merely an act of negligent excavation during the policy period, but that this negligence also caused immediate property damage during the policy period which, by 1957, after the policy period, spread to

adjoining property. "We agree * * * that the accident mentioned in the policy may be a process and the evidence in the instant case is sufficient to show that the process started during the term of the policy and progressed until the filing of the lawsuits. We rule this point against defendant." *Id.* at 509. We find that the *Kissel* case clearly indicates that Missouri would follow the majority view of the courts which have ruled that "property damage," within the meaning of a CGL policy, generally occurs at the time hazardous wastes are improperly disposed of and that the insurer at that time may be held liable for cleanup costs incurred after the policy expired.

Applying these principles, it is clear that the "property damage" proved in the *EPA* case, 579 F. Supp. at 830, first occurred in July, 1971, during the period of time when the first insurance policy issued by Continental to NEPACCO was in effect. *EPA*, 579 F. Supp. at 830 (noting that NEPACCO's agents dumped leaking, deteriorated barrels into the trench at the Denny Farm site and that, upon dumping of the wastes, a "strong odor emitted" and "continued for several months, maybe years.").[29] Under *Kissel*, it is also clear that Continental

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29. We hold that in a cleanup cost recovery case, the date of the insured "occurrence" is the date on which the hazardous wastes were improperly disposed of. In other words, we adopt the "exposure" view of coverage. Accordingly, only the first CGL policy at issue provides coverage for the damages proved in the *EPA* case. *See, e.g., Hancock Laboratories, Inc.*, 777 F.2d at 524-25. A recent Harvard Law Review comment argues that the appropriate standard for property damage caused by hazardous waste should be the "continuous trigger" rule which provides that the property damage occurrence is continuous, extending from disposal to manifestation of the damage. *Developments in the Law, Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1581-83

(Continued on following page)

may additionally be liable for the continuing spread of the "property damage" at and around the Denny farm site, which first began in July, 1971. *Kissel*, 380 S.W.2d at 509. Accordingly, we reverse the district court's order with respect to Count I of Continental's complaint and remand for resolution of the remaining issues[30] which must be resolved before it can be determined whether Continental must indemnify NEPACCO for the damages awarded in the *EPA* suit.

It also follows, however, from our holding on the question of the time of the relevant "property damage" "occurrence," that Continental is not liable to defend or

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Footnote continued—

(1986). *See also*, Note *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. Cal. L. Rev. 745, 758-59 (1984). Perhaps most supportive of the continuous trigger theory is the presumption of maximum coverage. *See American Home Prods. Corp.*, 565 F. Supp. at 1491-92. Additionally, hazardous waste damage is a continuous process, which suggests that the time of the property damage occurrence extends from the time of improper disposal to the time the damage is manifested. However, the *Kissel* case suggests that, under Missouri law, the continuing damage would be covered under the policy in effect when the damage first occurred, 380 S.W.2d at 509, at least where, as here, this can be readily determined. As the Harvard Law Review article suggests, the continuous trigger theory might have merit in fact situations different from that posed here, such as where it is impossible to determine when the improper release occurred. In this situation, it may be reasonable to view the time of the occurrence as the time the accident or release is first discovered. We are not faced with such a situation here, however, and we are not persuaded that the continuous trigger theory has merit in a cleanup cost recovery case such as this one where the date of the first property damage occurrence is clear and where the cleanup efforts have been pinpointed at the site of this damage.

30. *See supra* note 5, on the "occurrence" question. There is no remaining issue on the "pollution exclusion" clause, however, because the property damage proved in the EPA case occurred during the first CGL policy does not contain a pollution exclusion clause.

indemnify NEPACCO for liability arising from the *IPC* suit. The complaint in *IPC* alleges that in 1971 or 1972, Russell Bliss, pursuant to an agreement with IPC and NEPACCO, transported dioxin-contaminated waste oil from the NEPACCO plant in Verona, Missouri, and spread the contaminated oil on the premises of the Bubbling Springs Stable in Fenton, Missouri. This would be the relevant time of the "property damage" "occurrence" for purposes of cleaning up the Bubbling Springs Stable. However, the *IPC* complaint does not seek to recover costs for cleaning up the Bubbling Springs Ranch, nor does it seek recovery for the diminution in the value of resources at or around the Bubbling Springs Ranch and its watershed. Instead, the state seeks to recover the costs of cleaning up the Minker/Stout/Romaine Creek site which was contaminated when twenty loads of contaminated fill dirt from the Bubbling Springs Ranch were deposited there in 1974, after the CGL policies had expired. Because the damage at the Minker/Stout/Romaine Creek site first occurred after the last CGL policy's effective date, we find that it would be beyond the reach of the reasoning in *Kissel* to hold Continental liable for this damage which began after the policy lapsed. Accordingly, we affirm the district court's finding on the state's counterclaim that Continental has no duty to defend or indemnify NEPACCO for potential liability in the pending *IPC* suit.

B. *Capstick Claims.*

The State of Missouri contends that the district court erred in dismissing, without prejudice, Count II of Continental's complaint which seeks a declaration of no duty to defend or indemnify NEPACCO in the *Capstick* law-

suit. The *Capstick* suit differs in several respects from the *EPA* and *IPC* suits. The latter involve governmental cleanup cost recoveries under CERCLA; the former involves claims by private individuals for personal and property damage arising out of improper disposal of NEPACCO's hazardous wastes. We agree with the trial court that resolution of the insurance coverage issues in *Capstick* requires additional fact finding and analysis, *see Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.*, Civ. No. 83-3347, (D. D.C., filed Feb. 4, 1986), which may be pursued most effectively in a different proceeding. Accordingly, the district court's decision granting Continental's motion to voluntarily dismiss Count II without prejudice is affirmed.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

For the reasons discussed below, I would affirm the order of the district court, although for reasons different than those set forth in its memorandum order. This appeal presents difficult issues the resolution of which will have a substantial effect upon liability insurance cases involving hazardous waste disposal.

I agree with much of the analysis set forth in the majority opinion. Specifically, I agree that Missouri law applies to these insurance policies. Missouri is the state that has the most significant relationship with the comprehensive general liability (CGL) insurance policies at issue. Slip op. at 8, note 10. I also agree with the majority that environmental damage is "damage to property" and that the release into the environment of hazardous wastes may cause property damage not only to the actual owners of land, water and air, but also to the quasi-sovereign interests of governmental entities. Slip op. at 8-14.

I also agree with the majority, slip op. at 18-25, that under Missouri law "the issue of liability under a policy insuring against 'loss' or 'damage' occurring during the policy period is determined by the time when the loss or damage occurs and not by the time of the negligent [or wrongful] act." *Hawkeye-Security Insurance Co. v. Iowa National Mutual Insurance Co.*, 567 S.W.2d 719, 720 (Mo. Ct. App. 1978), *citing Kirchner v. Hartford Accident & Indemnity Co.*, 440 S.W.2d 751 (Mo. Ct. App. 1969).

Given the specific facts in the present case, I further agree that property damage "occurred" in mid-July 1971, at a time within the policy period of the first CGL policy.

Slip op. at 23. Here, the crucial events—the wrongful act, the release of hazardous wastes into the environment ("property damage") and the "occurrence"—all happened virtually simultaneously. In some hazardous waste disposal cases, the act of disposal may cause the release of hazardous wastes into the environment at some point in the future. For example, the initial disposal may not result in a release of hazardous wastes within the policy period but much later after the policy has lapsed. In the present case, however, the disposal of the hazardous wastes immediately resulted in their release into the environment and, because by definition hazardous wastes are extremely harmful, there was clearly an "occurrence" of "property damage" within the policy period. Here, the geological and hydrological characteristics of the site made it unsuitable for the disposal of hazardous wastes; the hazardous wastes had been stored in drums that at the time of disposal were in a deteriorated condition; the drums were simply buried in an excavated trench; a strong odor emerged shortly thereafter and persisted for several months. Thus, the "occurrence" issue is something of a false issue on these facts.

I do not agree, however, with the majority that "cleanup costs under CERCLA are compensatory *damages* for 'property damage' within the meaning of the CGL policies." Slip op. at 18 (emphasis added). I would hold that under these CGL policies the insurer has no obligation to pay cleanup costs because cleanup costs constitute equitable monetary relief but not legal damages.

"An insuring obligation is a contract, and coverage exists only if assumed by the terms of the policy." *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d 399, 503 (5th Cir. 1955). Here, under the terms of the CGL policies,

the insurer is required to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . B. property damage to which this insurance applies caused by an occurrence. . . ." "The obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law." *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d at 503. "The word 'damages' is not ambiguous in the insurance context. Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 432 (D. Md. 1986), *citing Haines v. St. Paul Fire & Marine Insurance Co.*, 428 F. Supp. 435, 439-41 (D. Md. 1977), *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d at 503-04, *and Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (1954). *See also Garden Sanctuary, Inc. v. Insurance Co. of North America*, 292 So. 2d 75, 77-78 (Fla. Ct. App. 1974); *Ladd Construction Co. v. Insurance Co. of North America*, 73 Ill. App. 3d 43, 391 N.E.2d 568, 570-73 (1979). *But see United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843 (1983) (rejecting analysis in *Aetna Casualty & Surety Co. v. Hanna* as interpreting "damages" too narrowly).

"Traditionally, courts have found no insurance coverage for the costs of complying with an injunction even in cases where the suits could have been brought for damages." *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. at 434. Here, the federal government in the *EPA* lawsuit and the state of Missouri in the *IPC* lawsuit seek recovery of cleanup or response costs pursuant to CERCLA § 107 (a) (4) (A), 42 U.S.C. § 9607 (a) (4) (A). These actions are essentially *equitable* actions for monetary relief in the

form of restitution or reimbursement of costs. *See United States v. Northeastern Pharmaceutical & Chemical Co.*, No. 84-1837, slip op. at 44 (8th Cir. Dec. 31, 1986). The federal and state governments do not seek recovery of "*damages* for injury to, destruction of, or loss of natural resources," pursuant to CERCLA § 107(a)(4)(C) (emphasis added), 42 U.S.C. § 9607(a)(4)(C) (emphasis added).

In short, I cannot agree that cleanup costs are the equivalent of "damages," *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. at 435. CERCLA defendants are liable for both cleanup costs under CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), and for damages to natural resources under CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C); in a particular case, the *measure* of liability for cleanup costs and for damages to natural resources may be the same. Slip. op. at 15-20 & note 20, *citing Jack L. Baker Cos. v. Pasley Manufacturing & Distributing Co.*, 413 S.W.2d 268, 273-74 (Mo. 1967). Merely because "no practical difference exists between the sums which the *insured* [, that is, the CERCLA defendant,] must pay the court under some equitable remedy as opposed to sums payable for damages," *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. at 435 (emphasis added), does not mean that the sums constitute equivalent obligations to pay on the part of the *insurer*.

In *United States Aviex Co. v. Travelers Insurance Co.*, 336 N.W.2d at 843, the court described as "merely fortuitous from the standpoint of either plaintiff [insured] or defendant [insurer] whether the state chooses to pursue an equitable remedy rather than to sue to recover damages, because "the damage to the natural resources is simply measured in the cost to restore the [environment] to its original state." In my view, that analysis

must be limited to the liability of the insured and the measurement of that liability under environmental laws like CERCLA. The liability of the insurer is a distinct issue, and I would argue that, at least with respect to the liability of the insurer under the CGL policies, whether the federal and state governments choose to pursue equitable remedies or to recover damages is not "merely fortuitous."

I also agree that the insurer has no duty to defend the *IPC* lawsuit because the property damage occurred in 1974 after the policies lapsed, slip op. at 24-25, *and* because, as discussed above, cleanup costs are not "damages."

I also agree that the issues in the *Capstick* lawsuit require additional factfinding and analysis and are therefore unsuitable for summary disposition. Slip op. at 25. Because the private individuals in *Capstick* are seeking damages for personal injury and property damage due to the improper disposal of hazardous wastes and *not* cleanup costs consistent with the national contingency plan pursuant to CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), I would hold the insurer cannot refuse to defend the *Capstick* lawsuit for that reason.

Accordingly, I would affirm the order of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Filed June 25, 1985)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

No. 84-5034-CV-S-4

CONTINENTAL INSURANCE COMPANIES,
Plaintiff,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., et al.,
Defendants.

ORDER

PROCEDURAL AND FACTUAL BACKGROUND

Continental Insurance Company filed this declaratory judgment action on February 9, 1984. The declaratory judgment action sought a declaration of the rights and liabilities concerning two separate lawsuits concerning certain hazardous wastes initially produced by the defendant Northeastern Pharmaceutical and Chemical Company (NEPACCO) at their manufacturing site near Verona, Missouri. The initial suit, *United States v. Northeastern Pharmaceutical and Chemical Company (NEPACCO)*, 80-5066-CV-SW-4 (hereinafter referred to as the EPA suit) was tried before this Court and a memorandum opinion was issued January 31, 1984, reported at 579 F. Supp. 823 (W.D. Mo. 1984). In that order, the Court found the defendants jointly and severally liable pursuant to §§ 104, 106(a) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act

(CERCLA) of 1980, 42 U.S.C. §§ 9604, 9606(a) and 9607 (a) for costs of removal or remedial action incurred in cleaning up certain disposed of hazardous wastes at the Denney farm site, near Verona, Missouri, after December 10, 1980, as well as litigation costs, including attorney's fees, salaries and expenses and future costs of removal or remedial action. The second lawsuit is *Capstick v. Independent Petrochemical Corp., et al*, filed March 7, 1983 in the Circuit Court of the City of St. Louis, Missouri, No. 832-00453 (hereinafter referred to as the *Capstick* suit). The Capstick lawsuit named as defendants the same defendants in the EPA suit, as well as numerous individuals and corporations which were alleged to have transported and spread upon the streets and roads of Times Beach, Missouri certain hazardous wastes in 1972 or 1973. In addition the *Capstick* lawsuit includes an allegation that certain hazardous wastes produced at the NEPACCO plant, near Verona, Missouri, were sprayed by certain defendants on the Bubbling Springs Stables farm in Fenton, Missouri. Allegedly, the contaminated soil was subsequently taken and spread on adjacent property in Imperial, Missouri.

The plaintiffs in the *Capstick* lawsuit seek: (1) recovery for present and future personal injury and property damage; (2) payment for clean-up operations; and (3) punitive damages. No claims pursuant to CERCLA or § 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6973 (1980) were made.

On December 24, 1985, the State of Missouri filed a motion for leave to intervene. Plaintiffs did not oppose the motion to intervene but sought to respond to the State's allegation. The motion to intervene was granted on January 25, 1985. The State's interest arises from a

suit filed by the State of Missouri against Independent Petrochemical (IPC); NEPACCO, Michaels, Lee, Bliss, Jerry-Russell Bliss, Inc., Syntex Laboratories, Inc., Syntex Agribusiness, Inc. in the United States District Court for the Eastern District of Missouri, Eastern Division, No. 83-2670-C-C (hereinafter referred to as the *IPC* suit), filed November 23, 1983, pursuant to § 107(a) of CERCLA, 42 U.S.C. § 9607(a) (1976) and Supp. VI (1981), and Missouri common law of public nuisance. The action was filed for the purpose of seeking (1) the reimbursement to the State of Missouri by the defendants of money expended by the State and its agencies in protecting members of the general public and the environment from the danger of soil contamination and (2) a declaratory judgment that defendants are liable for all future costs of remedial action at the above sites. The *IPC* and *Capstick* lawsuits are factually similar.

The State filed an answer to Continental's declaratory judgment action on January 25, 1985 and made a counterclaim against Continental for the reimbursement of past and future clean up costs at the sites noted in the *IPC* lawsuit.

On February 11, 1985, a motion was filed by Raymond F. Wehner to intervene. In support of said motion, the movant notes that numerous lawsuits by Wehner and approximately 1,000 other individuals are or will be pending in the United States Court, Eastern District of Missouri and the Circuit Court for the City of St. Louis, State of Missouri. The actions are substantially identical in fact to the *EPA*, *IPC* and *Capstick* lawsuits. In addition, the actions seek damages for personal injury and property damage based upon negligence, strict liability, and products liability. The movant suggests that there are

common legal and factual issues. Plaintiff filed a response and suggestions in opposition to Wehner's motion to intervene on March 11, 1985. Essentially, the plaintiff contends that the movant Wehner lacks standing, his claims are unrelated to the subject lawsuits, and that whatever interests the movant Wehner has are already protected by the State of Missouri. To date, the Court has not ruled upon the pending motion to intervene by Wehner.

The plaintiff, Continental Insurance Company, filed a motion for summary judgment on November 14, 1984. Intervenor, State of Missouri, filed suggestions in opposition to plaintiff's motion for summary judgment on March 11, 1985. Pending a resolution of this motion for summary judgment, plaintiff filed a motion to dismiss Count II of its complaint for declaratory judgment without prejudice relative to its obligation to defend and indemnify the defendants in the *Capstick* lawsuit. The defendant intervenor, State of Missouri, filed suggestions in opposition to plaintiff's motion to dismiss Count II without prejudice.

On March 29, 1985, this Court granted a joint motion by the State of Missouri and the United States to consolidate their lawsuits for purposes of discovery since there were common questions of fact and law pursuant to Fed.R.Civ.P. 42(a). Numerous discovery motions have also been filed by the parties. Movant and suggested intervenor Raymond F. Wehner filed a motion to withdraw his motion to intervene on June 10, 1985.

For the following reasons, the Court finds that summary judgment should be granted in favor of Continental Insurance Companies as to Count I of its declaratory

action, and that summary judgment should be granted in favor of Continental Insurance Companies as to the counterclaim pled by the intervenor, State of Missouri. In addition, the Court finds that plaintiff's motion to dismiss Count II of its declaratory judgment action without prejudice should be granted and plaintiff's motion to dismiss the defendant-intervenor State of Missouri's counterclaim should be denied. Finally, movant-intervenor Raymond R. Wehner's motion to withdraw motion to intervene should be granted. All other motions will be denied as moot and the parties are to bear their own costs.

CONCLUSIONS OF LAW

Granting declaratory relief is within the sound discretion of the trial court. C. Wright, A. Miller and Kane, *Federal Practice and Procedure*, § 2759 (2d Ed. 1983). The elements and general criteria for declaratory judgment relief are sufficiently set forth by the Eighth Circuit in *Alsager v. District Court of Polk County, Iowa, Juv. Div.*, 518 F.2d 1160, 1163-64 (8th Cir. 1975). In determining whether or not declaratory relief is proper in a given situation it is appropriate to focus on two criteria: (1) whether the declaratory judgment will serve a useful purpose in clarifying and settling important legal issues between the parties; and (2) whether a declaratory judgment will afford relief from uncertainty, insecurity and controversy. *Id.; Twin City Federal Savings and Loan Association v. Gelhar*, 525 F.Supp. 802, 804 (D. Minn. 1981), *aff'd*, 681 F.2d 528 (8th Cir. 1982). Certainly, for a declaratory judgment to issue there must be a dispute which does not call "for an advisory opinion upon a hypothetical basis but for an adjudication of

present rights based upon established facts." *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977).

In contemplating a motion for summary judgment under Fed.R.Civ.P. 56, this Court is mindful of the strict standards imposed by the Eighth Circuit Court of Appeals. *McGee v. Hester*, 724 F.2d 89, 91 (8th Cir. 1983); *Roberts v. Browing*, 610 F.2d 528, 531-32 and 536 (8th Cir. 1979).

The issue sought to be resolved is whether or not the plaintiff, Continental Insurance Companies, owes the defendants a duty to defend and a duty to indemnify in the various actions. The plaintiff issued three Comprehensive General Liability (CGL) policies covering the operations of NEPACCO, and its officers and employees, including Edwin B. Michaels and John W. Lee. The three CGL policies were in effect from August 5, 1970 until November 17, 1973. It is undisputed that the plaintiff is presently providing the above-mentioned defendants a defense to all the above-named actions with a reservation of rights. Plaintiff has specifically denied said obligation to defend or indemnify in the various actions. The duties to defend and/or indemnify are sufficiently set forth by the Eighth Circuit in *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 624 (8th Cir. 1981):

> Under Missouri law, the duty of a liability insurer to defend pursuant to its agreement is ordinarily determined by comparing the language of the insurance contract and the allegations of the petition or complaint in the action brought by the person injured or damaged against the insured. * * * Courts have generally placed the burden of uncertainty as to the policy's coverage on the insurer. Where the allega-

> tions of a plaintiff's complaint * * * state a claim which is *potentially* or arguably within the policy's coverage, the insurer must accept defense of the claim. (citation omitted).
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> * * * *
>
> We note that the duty to defend is not coexistent with the duty to indemnify. Rather, "the duty of an insurer to defend its insured is broader than its duty to pay a judgment rendered against its insured." *U.S. Fidelity and Guaranty Co. v. Louis A. Roser Co.*, 585 F.2d 932, 936 (8th Cir. 1978) (construing a provision similar to ours which gives U.S.F.&G. the "right and duty to defend any suit against the insured * * * even if any of the allegations of the suit are groundless, false, or fraudulent. . . ."

Id. at 624-625. *See also, Missouri Terrazzo v. Iowa Nat'l Mut. Ins.*, 566 F.Supp. 546, 554 (E.D. Mo. 1983); *Ranger Ins. Co. v. Mercantile Trust Co.*, 363 F.Supp. 795, 800 (E.D. Mo. 1973); *Fidelity and Cas. Co. of New York v. Wrather*, 652 S.W.2d 245, 247 (Mo. App. 1983). In addition, the insurer may provide a defense with the reservation of rights and does not concede his obligation to provide such a defense or to indemnify. *Hawkeye-Security Ins. Co. v. Iowa Nat'l Mut. Ins. Co.*, 567 S.W.2d 719, 720-21 (Mo. App. 1978).

The parties, as well as this Court, agree that Missouri law applies to the interpretation of the insurance policies at issue; since, the State of Missouri has the most significant relation with the negotiation and terms of the insurance contract. *Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263 (8th Cir.), *cert. denied*, 421 U.S. 999 (1975); *Ryder Truck Rental v. U.S. Fidelity*

and Guaranty Co., 527 F.Supp. 666 (E.D. Mo. 1981); *National Starch and Chemical Corp. v. Newman*, 577 S.W. 2d 99 (Mo. App. 1978).

Each of the comprehensive general liability policies have the following provisions:

> The Company [Continental] will pay on behalf of the insured all sums which the *insured* shall become legally obligated to pay as damages because of A. *bodily injury* or B. *property damage* to which this insurance applies caused by an occurrence, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage. . . .

All three policies contain the following definition of an occurrence:

> 'Occurrence' means an accident, including continuous or repeated exposure to conditions, injury or property damage neither expected nor intended from the standpoint of the insured.

All three CGL policies issued to NEPACCO provide: "This insurance applies only to bodily injury or property damage which occurs during the policy period. . . ." The applicable insurance policy provisions in the second and third policies, effective August 5, 1971 through November 17, 1973, contain a pollution and contamination exclusion clause:

> It is agreed that the insurance does not apply to *bodily injury* or *property damage* arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants,

> contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

The plaintiff contends that it owes no duty to defend or indemnify because: (1) the damages which are alleged in the underlying lawsuits either were not caused by an "occurrence" or were excluded from coverage by the pollution exclusion clause; (2) the damages alleged in the underlying lawsuits did not occur within any of the three policy periods, August 5, 1971 through November 17, 1973; (3) the EPA lawsuit is not predicated on insurable "bodily injury" or "property damage"; and (4) the punitive damages sought in the *Capstick* lawsuit are excluded from coverage.

Initially, the defendants and intervenors contend that the policy language either clearly provides for such coverage or such policy language is ambiguous and should be construed in favor of the insured giving rise to a duty to defend and indemnify on the part of the plaintiff, Continental Insurance Companies. As noted in *Pearce v. General American Life Ins. Co.*, 637 F.2d 536 (8th Cir. 1980):

> As a general rule, plain and unambiguous language will be given its ordinary meaning and effect; the need to resort to construction arises only where an ambiguity exists. [citations omitted]. The language in the policy is ambiguous where it is reasonably susceptible of two interpretations. [citations omitted]. Such ambiguities are construed against the insurer, and in favor of the insured [citation omitted]. But where a term is defined in the policy, the Court

> must look there and nowhere else [citation omitted]. . . .

Id. at 539. Such a construction should give a reasonable meaning to the reasonable expectations and intentions of the parties in entering such a contract. The Court cannot create an ambiguity where no such ambiguity exists merely to enforce a particular construction which it might feel applicable. *State Farm Mut. Auto Ins. Co. v. Universal Underwriters Ins. Co.*, 594 S.W.2d 950, 953-54 (Mo. App. 1980); *Reliance Insurance Co. of Pa. v. Community Fed. S. & L. Ass'n*, 440 S.W.2d 929, 931 (Mo. 1969). The purpose of an insurance contract is to furnish protection where reasonably possible. Such a contract should be construed to provide protection to the insured, if possible. *Bellamy v. Pacific Mut. Life Ins. Co.*, 651 S.W.2d 490, 496 (Mo. banc 1983). Finally, restrictive exclusionary clauses which would tend to limit or restrict the insurance coverage provided are to be strictly construed against the insurer. *McMichael v. American Ins. Co.*, 351 F.2d 665, 669 (8th Cir. 1965); *Ranger Ins. Co. v. Mercantile Trust Co.*, 363 F.2d at 801; *McRaven v. F-Stop Photo Labs. Inc.*, 660 S.W.2d 459, 462 (Mo. App. 1983); *Ins. Co. v. West Plains Air*, 637 S.W.2d 444, 446 (Mo. App. 1982).

A. Damages Incurred in the EPA and the IPC Lawsuits

Pursuant to the insurance contract, the insurer is liable only for "bodily injury or property damage which occurs during the policy period." The Court finds that the insurance contracts, relative to the time of the occurrence, is unambiguous as applied to the instances giving rise to liability in the EPA and IPC lawsuits. It is set-

tled law in the State of Missouri, that the time of an "occurrence" within the meaning of an indemnity policy is the time the loss or damage was sustained and not the time when the negligence or wrongful act was committed. *Hawkeye-Security Ins. Co. v. Iowa Nat'l Mut. Ins. Co.*, 567 S.W.2d at 720; *Kirchner v. Hartford Accident and Indemnity Co.*, 440 S.W.2d 751, 756 (Mo. App. 1969). Consequently, this Court must analyze the actual loss sustained by the parties and determine at what time such loss was sustained.

As noted above, the defendants were found liable in the EPA lawsuit pursuant to §§ 104, 106(a) and 107(a), CERCLA, for removal and remedial costs, litigation costs, attorney fees, salaries and future expenses of removal and remedial action after December 10, 1980. This finding was based upon the premise that no liability was found under RCRA and that CERCLA did not become effective until December 11, 1980. *United States v. Northeastern Pharm. & Chemical Co.*, 579 F.Supp. at 850-852. The alleged wrongful acts in the *EPA* lawsuit took place in the early 1970's.

The *IPC* lawsuit was filed by the State of Missouri against Independent Petrochemical Corporation and others. Among the party defendants in the *IPC* lawsuit are NEPACCO, Michaels and Lee, who are also the party defendants in the *EPA* lawsuit. The *IPC* lawsuit seeks compensation for all costs incurred by the State of Missouri for its efforts in cleaning up an area near Imperial, Missouri, commonly referred to as the Meeker/Stout/Romaine Creek site and for a declaratory judgment that the party defendants are liable for all future costs of remedial action at the site which are incurred by the State and/or its agencies. The *IPC* lawsuit alleges that the Meek-

er/Stout/Romaine Creek site became contaminated with dioxin because of various actions and inactions on the part of NEPACCO, Michaels, Lee, Bliss and the remaining defendants in the *IPC* lawsuit. A complaint was brought pursuant to §§ 107(a) of CERCLA, 42 U.S.C. § 9607(a) (1976 and Supp. VI 1981), and Missouri common law of public nuisance. All of the alleged wrongful and/or negligent acts committed in the *IPC* lawsuit took place from 1970 to 1973. Briefly, the IPC lawsuit alleges that NEPACCO arranged for the disposal of the dioxin-contaminated waste; that Bliss spread the dioxin-contaminated waste on the grounds of the Bubbling Springs Ranch near Imperial, Missouri as a dust suppressant; that because of the unexplained dilatorious effects of the spraying on the health of horses and/or other animals, the owner and/or operator of the Bubbling Springs Ranch had the soil upon which the contaminated waste had been sprayed excavated and removed; that the dioxin contaminated soil was then hauled away and a portion of it was used as fill material at various locations, including the Meeker/Stout/Romaine Creek site. Reviewing the *IPC* complaint, it becomes apparent that the State did not incur any remedial or removal costs until late 1982. Once again, as in the *EPA* lawsuit, a governmental entity is seeking indemnification for response costs incurred due to a toxic waste clean up and contamination prevention operation. If the State of Missouri does prevail in the *IPC* lawsuit, then according to this Court's prior holding in the *EPA* lawsuit, only those costs incurred after December 10, 1980 can be recovered in such an action. It is significant in both the *EPA* and *IPC* lawsuits, that there are not allegations that damages were incurred by the governmental entities during the time of the policies' effective dates. In fact, a very lengthy span of time separates the alleged

wrongful or negligent acts and the loss incurred by the governmental entities. The governmental entities do not seek compensation for bodily injury, or property damage.

This case appears analogous to *Kirkham and Michaels Ass'n, Inc. v. Travelers Indemnity Co.*, 361 F.Supp. 189 (D. S.D. 1973), *aff'd*, 493 F.2d 475 (8th Cir. 1974). *Kirkham* involved a contract for insurance concerning a waste treatment plant. The city took over the project after a lapse of the insurance policy, although, the negligent acts would have been committed during the policy period. The defendant insurer in denying an obligation to defend or indemnity argued that since the sewage treatment plant was not taken over by the city until after the policy coverage lapsed, the city could not have been damaged until after that date. The insured in the *Kirkham* case argued, as do the insured and the State of Missouri in the *IPC* and *EPA* cases, that the defendants' actions constituted a continuous course of negligence or wrongful acts. The district court rejected this argument relying upon the general rule that the time of an occurrence within the meaning of an indemnity policy is determined by the time the actual damage occurred and not the time when the wrongful act was committed. Such would appear to be the case at hand. Although the complaint suggests that the wrongful and negligent act did occur during the policy periods, there is no allegation that the State of Missouri or the United States incurred any loss or damage during this same policy period. It was not until the governmental entities incurred remedial or removal costs that they sustained a loss which was compensable.

The insurance clauses concerning the time of the occurrence relative to the *EPA* and *IPC* lawsuits do not appear to be ambiguous.

Accordingly, since there was no damage or loss incurred by the governmental entities until after the policy period effective dates, there was not an occurrence giving rise to the insurer's liability for their losses. Consequently, summary judgment should be granted in favor of Continental Insurance Company as to Count I of its declaratory judgment action. In addition, summary judgment should be entered in favor of Continental Insurance Company on the State's counterclaim relative to the insurer's duty to defend or indemnify in the *IPC* lawsuit, since, it appears on the face of the complaint that the State did not incur a loss or damage until after the lapse of the policies' periods.

B. Capstick Litigation

Resolution of the declaratory action relative to the *Capstick* lawsuit is considerably more difficult. In analyzing these issues, the Court has considered the parties' arguments relative to the application of the pollution exclusion clause contained in the insurance contracts, definition of an "occurrence" as an "accident," the number of "occurrences" and whether the parties involved suffered bodily injury or property damage during the policies' periods.

The Court finds that it is unable to determine at this point the applicability of the pollution exclusion clauses, the definition of an "occurrence" as applied to the facts of this case, or the number of occurrences involved. Suffice it to say, there are numerous decisions which have construed the pollution exclusion clause and reached various differing opinions as to their applicability. *Great Lakes Container v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984); *American States Ins. Co. v.*

Maryland Casualty Co., 587 F.Supp. 1549 (E.D. Mich. 1984); *Waste Management of Carolinas v. Peerless Ins.*, 323 S.W.2d 726 (N.C. App. 1984); *Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co.*, 451 A.2d 999 (N.J. Super. Ct. Law Div. 1982); *Niagara County v. Utica Mut. Ins. Co.*, 439 N.Y.S.2d 538 (N.Y. App. Div. 1981); *Allstate Ins. Co. v. Klock Oil Co.*, 426 N.Y.S.2d 603 (N.Y. Super. Ct. App. Div. 1980); *Lansco, Inc. v. Department of Environmental Protection*, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1980).

The most perplexing issue upon which this Court has determined that a declaratory judgment is improper is whether the insured has incurred a loss which occurred during the policy period. The defendants and intervenor argue that the initial wrongful or negligent acts and a certain amount of damage did occur within the policies' periods, August 5, 1970 through November 17, 1973. Allegedly, additional damages occurred outside the policies' periods. On the other hand, the insurer argues that in this case coverage will only be triggered if the claimed injury or damage occurred during the policies' periods. The insurer argues that the date of damage or injury is properly measured by determining the date the damage became manifest or ascertainable. As noted above, the general rule in Missouri, relative to bodily injury and property damage, is that the time of loss and not the time of the wrongful or negligent acts determines the time in which the occurrence occurred. The defendants and intervenor argue that this policy clause is vague and ambiguous as applied to toxic waste litigation and that liability should attach from the time of the wrongful or negligent act (disposal) to the time of the discovery of the ultimate damage.

Numerous courts have analyzed these questions and the situation most analogous to the case at bar are those cases dealing with asbestos related diseases. The ultimate question in those cases was when does an injury, sickness or disease occur as defined by the insurance policies. The holdings of these courts can be classified in three categories: (1) the "exposure" theory; (2) the "manifestation" theory; and (3) the "injury in fact" theory.

First, under the exposure theory, exposure to asbestos resulting in asbestosis was defined as a continuing tort and all insurance companies which provided coverage from the time of the injured's initial exposure to the time of the manifestation of the disease are jointly and severally liable to defend and to indemnify the defendant, if liability is found. Several courts relying on the exposure theory have construed the CGL policy terms to provide coverage for the progressive and long term illness of asbestosis. The exposure theory has been adopted by the Fifth, the Sixth, and the District of Columbia Circuits. In doing so, the courts have found the term "bodily injury and occurrence" inherently ambiguous as applied to progressive diseases such as asbestosis. Those courts theorize that the exposure theory tends more to closely approximate the reasonable expectations of the manufacturer and the insurer at the time the contract was entered into. *See, Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976 (5th Cir. 1985); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Ins. Co. of North America v. Forty-Eight Insulators, Inc.*, 633 F.2d 1212 (6th Cir. 1980); *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F.Supp. 1515 (D. D.C. 1984).

Second, the manifestation theory holds that only those insurance companies providing coverage at the time the injuries manifested themselves or become reasonably ascertainable by medical diagnosis are liable for damages or bodily injury. These courts have rejected the exposure theory and found that the CGL provisions actually support a manifestation theory. *Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.*, 523 F.Supp. 110 (D. Mass. 1981), *modified* 682 F.2d 12 (1st Cir. 1982), *cert. denied*, ... U.S. ....., 103 S.Ct. 1279 (1983). The manifestation theory was also followed by the Third Circuit in *Appalachian Ins. Co. v. Liberty Mutual Insurance Company*, 676 F.2d 56 (3rd Cir. 1982) when dealing with sex discrimination, but the court carefully distinguished that case from the various asbestosis cases. *Id.* at p. 62 n.14. *See also, U.S. Fidelity and Guaranty Co. v. American Ins. Co.*, 345 N.E.2d 267 (Ind. App. 1976).

Third, the injury in fact theory rejects both exposure and manifestation theories, instead, holding that the insured must prove an injury in fact during the policy period in order for coverage to apply. The most thorough examination of the various theories is provided by the district court in *American Home Products v. Liberty Mut. Ins. Co.*, 565 F.Supp. 1485 (S.D. N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). Although not determining this issue at this time, this Court does find itself in agreement with the scholarly and thorough opinion written by District Judge Sofaer in *American Home Products*. The appellate court agreed with the injury in fact theory, but felt that the lower court's requirement that the injury in fact be "diagnosable" or "compensable" during the policy period was unwarranted. In quoting the district court, the second circuit stated: "[A] real

but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became [diagnosable]." 748 F.2d at 766, *quoting* the district court at 565 F.Supp. at 1497. Although this is an issue of first impression in the Eighth Circuit, it does appear that the Eighth Circuit agrees in principle that the terms "bodily injury" and "property damage" as applied to CGL policies are inherently ambiguous as applied to progressive diseases. Such a conclusion was reached in *Hon v. Director, Office of Workers Compensation Programs*, 699 F.2d 441 (8th Cir. 1983). In making such a determination, the Eighth Circuit noted the split among the various other circuits, adopting either the exposure or manifestation theories. *Id.* at 443. This was particularly important when the case involved cumulative illnesses such as the black lung disease considered in *Hon*.

This Court finds that a declaratory judgment as to the rights and obligations of the various parties at this juncture in the *Capstick* and *Wehner* litigation is premature. Initially, the Court notes that those courts which have considered the various theories, manifestation, exposure, or injury in fact, have at least had substantial medical evidence as to the progression and nature of the diseases in question. To date, this Court, nor any other court to its knowledge, has analyzed the exact nature and progression of the diseases or illnesses related to hazardous waste. In addition, the cases at issue involve both bodily injury and property damage. Given these uncertainties in factual allegations, it does not appear that these actions are ripe for a determination as to the rights and liabilities of the various parties. Suffice it to say, this Court finds that a more proper determination

of the various issues concerning the insurer's duty to defend and to indemnify can be made after more specific findings of bodily injury and property damage are made. Certainly, a court could not attempt to resolve those major issues concerning insurance coverage for victims of hazardous waste disposal without having determined the various policy considerations and medical facts of each individual case.

Finally, the pollution exclusion clause specifically states that it "does not apply if such discharge, dispersal, release or escape is sudden and accidental." Whether the events giving rise to the *Capstick* and *Wehner* lawsuits amount to a "sudden and accidental" occurrence will inevitably depend upon findings of fact after a trial on the merits. Those courts construing the applicability of the pollution exclusion clause, *supra*, have consistently been called upon to determine whether the pollution incident amounted to an "accident" as defined in the CGL policies. Such a determination may involve ascertaining whether the polluting acts were intended or unintended and whether the pollution results were intended or unintended, in that the pollution results were the "natural" and "probable consequences" of the insured's acts. *See also, American Cas. Co. v. Minn. F.B.S. Co.*, 270 F.2d 686 (8th Cir. 1959); *Missouri Terrazzo v. Iowa Nat'l Mut. Ins.*, 566 F.Supp. 546 (E.D. Mo. 1983); *Fidelity & Cas. Co. of New York v. Wrather*, 652 S.W.2d 245 (Mo. App. 1983); *Truck Ins. Exchange v. Pickering*, 642 S.W.2d 113 (Mo. App. 1982); *Travelers Ins. Co. v. Cole*, 631 S.W.2d 661 (Mo. App. 1982); *White v. Smith*, 440 S.W.2d 497 (Mo. App. 1969); *Evans v. Aetna Cas. & Sur. Co.*, 435 N.Y.S.2d 933 (N.Y. Super Ct. 1981); *Aetna Cas. & Sur. Co. v. Freyer*, 411 N.E. 2d 1157 (Ill. App. 1980); *Clark v. London & Lancashire Indemnity Co. of America*, 124 N.W.2d 29 (Wisc. 1963).

Accordingly, it appears that plaintiff's motion to dismiss Count II of its declaratory action without prejudice is meritorious. In addition, the motion of movant-intervenor Robert F. Wehner to withdraw his motion to intervene should be granted.

Since the plaintiff has prevailed in its motion for summary judgment in Count I of its original declaratory judgment action and on the counterclaim filed by the State of Missouri, but seeks to dismiss in regard to the *Capstick* lawsuit, the Court finds that the various parties should be liable for their own costs.

Accordingly, for the above reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as to Count I of its declaratory judgment action; and it is further

ORDERED that summary judgment is entered in favor of the plaintiff Continental Insurance Company and against the State of Missouri as to the State of Missouri's counterclaim dated January 25, 1985; and it is further

ORDERED that plaintiff's motion to dismiss Count II without prejudice is granted; and it is further

ORDERED that the motion of Robert F. Wehner to withdraw his motion to intervene is granted; and it is further

ORDERED that the parties shall be liable for their own costs; and it is further

ORDERED that all other motions are denied as moot.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: June 25, 1985

(Filed June 26, 1985)

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 85-3069-CV-S-4

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CONTINENTAL INSURANCE COMPANY, INC.,
Defendant.

ORDER

Pursuant to the order entered in Case No. 84-5034-CV-S-4, *Continental Insurance Companies v. NEPACCO, et al.*, the defendant-garnishee is entitled to judgment in the above-captioned case. Therefore, it is hereby

ORDERED that the Clerk is directed to enter judgment in favor of Continental Insurance Company and against plaintiff United States of America in the above-captioned case.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: June 26, 1985

(Filed May 4, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1940-WM

The Continental Insurance Companies,
Appellee,

vs.

State of Missouri,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

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Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judges Arnold and John R. Gibson did not participate.

Petition for rehearing by the panel is also denied.

May 4, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court
of Appeals, Eighth Circuit

(Filed February 19, 1984)

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

Case No. 84-5034-CV-SW-O

THE CONTINENTAL INSURANCE COMPANIES,
a New Hampshire Corporation,
Plaintiff,

vs.

NORTHEASTERN PHARMACEUTICAL AND
CHEMICAL COMPANY, INC., a
Delaware Corporation,

[SERVE:

Northeastern Pharmaceutical and Chemical Company, Inc.,
c/o Missouri Secretary of State,
Attn.: Pat Taggart,
P. O. Box 778,
Jefferson City, Missouri;

Milton Turkel, as Statutory Trustee for Northeastern Pharmaceutical and Chemical Company, Inc.,
218 Bedford Street,
Stamford, Connecticut 06901;

Edwin B. Michaels, as Statutory Trustee for Northeastern Pharmaceutical and Chemical Company, Inc.,
9 Gregory Court,
East Norwalk, Connecticut 06855; and

John W. Lee, as Statutory Trustee for Northeastern Pharmaceutical and Chemical Company, Inc.,
55 Glen Avenue,
Norwalk, Connecticut 06850]

and

MILTON TURKEL, 218 Bedford Street,
Stamford, Connecticut,

[PERSONALLY SERVE:

Milton Turkel,
218 Bedford Street,
Norwalk, Connecticut 06850]

and

EDWIN B. MICHAELS, 9 Gregory Court, East
Norwalk, Connecticut 06855,

[PERSONALLY SERVE:

Edwin B. Michaels,
9 Gregory Court,
East Norwalk, Connecticut 06855]

and

JOHN W. LEE, 55 Glen Avenue, Norwalk,
Connecticut 06850,

[PERSONALLY SERVE:

John W. Lee,
55 Glen Avenue,
Norwalk, Connecticut 06850]

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW plaintiff, and for its Complaint for Declaratory Judgment, states and alleges as follows:

ALLEGATIONS PERTAINING TO ALL COUNTS

The Parties

1. Plaintiff, The Continental Insurance Companies (hereinafter "Continental"), is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New Hampshire, with its principal place of business in the State of New York, and was and is licensed to engage in the insurance business in the State of Missouri.

2. Defendant Northeastern Pharmaceutical and Chemical Company, Inc. (hereinafter "NEPACCO"), is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Delaware, and, on information and belief, was authorized to do business in the State of Missouri from March 18, 1970 to January 1, 1973.

3. NEPACCO's authority to transact business in the state of Missouri was revoked on or about January 1, 1973. As a result, pursuant to § 351.630 RSMo (1978), the Secretary of State of the State of Missouri is authorized as the agent and representative of NEPACCO to accept service of process on behalf of NEPACCO in this action.

4. Pursuant to § 351.525 RSMo (1978), the officers and directors in office when NEPACCO's authority to do business in Missouri lapsed are now the trustees of NEPACCO and may be sued.

5. Defendants Milton Turkel, Edwin B. Michaels and John W. Lee were directors ,and officers of NEPACCO when the corporation's authority to transact business was revoked. Thus, pursuant to § 351.525 RSMo (1978), the

above named defendants are the statutory trustees of NEPACCO. As a result, defendants Turkel, Michaels and Lee, as statutory trustees for NEPACCO, are also authorized as agents and representatives to accept service of process on behalf of NEPACCO in this action.

6. Defendant Milton Turkel (hereinafter "Turkel") is a citizen of the state of Connecticut and may be served at 218 Bedford Street, Stamford, Connecticut. Turkel has, as is more fully set forth herein, transacted business and/or entered into a contract within the state of Missouri and is, therefore, subject to the personal jurisdiction of this court and to service of process pursuant to the provisions of § 506.600 RSMo (1978) and Rule 54.06, Mo. R. Civ. P.

7. Defendant Edwin B. Michaels (hereinafter "Michaels") is a citizen of the State of Connecticut and may be served at 9 Gregory Court, East Norwalk, Connecticut. Michaels has, as is more fully set forth herein, transacted business and/or entered into a contract within the state of Missouri and is, therefore, subject to the personal jurisdiction of this Court and to service of process pursuant to the provisions of § 506.600 RSMo (1978) and Rule 54.06, Mo. R. Civ. P.

8. Defendant John W. Lee (hereinafter "Lee") is a citizen of the State of Connecticut and may be served at 55 Glen Avenue, Norwalk, Connecticut. Lee has, as is more fully set forth herein, transacted business and/or entered into a contract within the state of Missouri and is, therefore, subject to the personal jurisdiction of this Court and to service of process pursuant to the provisions of § 506.600 RSMo (1978) and Rule 54.06, Mo. R. Civ. P.

Jurisdiction and Venue

9. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000 and there is complete diversity of citizenship between plaintiff and defendants.

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391(a) which provides that an action founded on diversity of citizenship may be brought in the judicial district where all plaintiffs or defendants reside, or in which the claim arose. As is more fully set forth below, this action arose within the Western District of Missouri. Divisional venue lies in the Southern Division of the Western District of Missouri by virtue of the fact that *United States of America v. Northeastern Pharmaceutical & Chemical Co., Inc., Edwin B. Michaels, John W. Tee, Ronald Mills, and Syntex Agribusiness* (one of the underlying lawsuits, *see* paragraph 28 *infra*) is presently pending in the Southern Division of the Western District of Missouri. Therefore, defendants are subject to the jurisdiction and venue of this Court.

The Insurance Policies

11. On or before August 5, 1970, Continental executed and delivered its Combined Casualty Insurance Policy No. L 1669307, in the usual form, to NEPACCO. The policy period was from August 5, 1970 to August 5, 1971. The policy provided Comprehensive General Liability Insurance and Comprehensive Automobile Liability Insurance. Pursuant to the policy, the insured premises was the NEPACCO manufacturing plant located in Verona, Missouri which is within the Western District of the State

of Missouri. Under the Comprehensive General Liability insurance portion of the policy, NEPACCO and any executive officer or stockholder of the corporation, while acting within the scope of his duties, as such, were insured up to the following policy limits:

(a) For liability resulting from "bodily injury;" a maximum of $1,000,000 for each "occurrence" and $1,000,000 for each person; and

(b) For liability resulting from "property damage;" a maximum of $100,000 for each occurrence with an aggregate limit of $100,000.

12. On or before August 5, 1971, Continental executed and delivered its Combined Casualty Insurance Policy No. L 6334064, in usual form, to NEPACCO. The policy period was from August 5, 1971 to August 5, 1972. The policy provided Comprehensive General Liability Insurance and Comprehensive Automobile Liability Insurance. Pursuant to the policy, the insured premises was the NEPACCO manufacturing plant located in Verona, Missouri which is within the Western District of the State of Missouri. Under the Comprehensive General Liability portion of the policy, NEPACCO and any executive officer, director or stockholder of the corporation, while acting within the scope of his duties as such, were insured up to the following policy limits:

(a) For liability resulting from "bodily injury;" a maximum of $1,000,000 for each occurrence and $1,000,000 for each person; and

(b) For liability resulting from "property damage;" a maximum of $100,000 for each occurrence with an aggregate limit of $100,000.

13. On or before August 5, 1972, Continental executed and delivered its Combined Casualty Insurance Policy No. L 4454706, in the usual form, to NEPACCO. The policy period was from August 5, 1972, to August 5, 1973. NEPACCO cancelled the policy effective November 17, 1972. The policy provided Comprehensive General Liability Insurance and Comprehensive Automobile Liability Insurance. Pursuant to the policy, the insured premises was the NEPACCO manufacturing plant located in Verona, Missouri which is within the Western District of the State of Missouri. Under the Comprehensive General Liability Insurance portion of the policy, NEPACCO and any executive officer, director or shareholder of the corporation, while acting within the scope of his duties as such, were insured up to the following policy limits:

(a) For liability resulting from "bodily injury;" a maximum of $1,000,000 for each occurrence and $1,000,000 for each person; and

(b) For liability resulting from "property damage;" a maximum of $100,000 for each occurrence with an aggregate limit of $100,000.

14. Continental issued no insurance policies to any of the defendants other than the three Combined Casualty Insurance Policies identified in paragraphs 10, 11 and 12 above.

The Policy Provisions

15. In the Comprehensive General Liability Insurance portion of each of the above referenced insurance policies, Continental agreed, among other things, to pay on behalf of the insured, NEPACCO, including any executive officer, director or stockholder, all sums which

NEPACCO, or any executive officer, director or stockholder, while acting within the scope of their duties, should become legally obligated to pay as damages because of bodily injury or property damage, to which the insurance policies applied, caused by an occurrence.

16. In the above referenced insurance policies "occurrence" is generally defined as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Each of the above policies also contains a provision that the insurance applies only to bodily injury or property damage which occurs during the policy period.

17. In the above referenced insurance policies, "property damage" is generally defined as physical injury to, or destruction of, tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

18. In the above referenced policies, "bodily injury" is generally defined as bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death, at any time resulting therefrom.

19. In the above referenced insurance policies, for the purpose of determining the limits of Continental's liability for bodily injury and property damage, all bodily injury or property damage arising out of continuous or repeated exposure to substantially the same general conditions is considered as arising out of one occurrence.

20. Each of the above referenced insurance policies also contains a provision excluding coverage for bodily injury or property damage included within the "Completed Operations Hazard" of the policy.

21. In the above referenced policies, the "Completed Operations Hazard" is generally defined to include bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from the premises owned by or rented to the named insureds.

22. In the above referenced policies, "operations" are generally defined to include materials, parts, or equipment furnished in connection therewith.

23. In the above referenced policies, "operations" are deemed to be completed when all operations to be performed by or on behalf of NEPACCO at the site of the operations have been completed. Moreover, in the above referenced policies, operations which may require further service or maintenance work or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

24. Each of the above referenced insurance policies also contains a provision excluding coverage for bodily injury or property damage included within the "Products Hazard" clause of the policy.

25. In the above referenced policies, the "Products Hazard" is generally defined to include bodily injury and property damage arising out of NEPACCO's products or reliance upon a representation or warranty made at any

time with respect thereto, but only if the bodily injury or property damage occurs away from the premises owned or rented to NEPACCO and after physical possession of such products has been relinquished to others.

26. None of the three above referenced policies provide coverage for any injunctive or mandatory affirmative relief, nor do they provide coverage for the reimbursement of any expenses or costs incurred by the named insureds in response to or in compliance with any order of the court in the form of an injunction or mandating any other affirmative act.

27. The policies effective from August 5, 1971, through August 5, 1972, and from August 5, 1972, through November 17, 1972, contain a provision excluding coverage for bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, soot, fumes, acids, alkalis, toxic chemicals, liquid gases, waste materials or other irritants, contaminants or pollutants, into or upon land, the atmosphere or any water course or any body of water unless such discharge, dispersal, release or escape was sudden or accidental (the "Pollution Exclusion").

The Underlying Lawsuits

28. Continental seeks a declaratory judgment concerning coverage by virtue of the above referenced policies of claims asserted in the *United States of America v. Northeastern Pharmaceutical & Chemical Co., Inc., Edwin B. Michaels, John W. Lee, Ronald Mills, and Syntex Agribusiness;* and *John Cappstick, Penny Cappstick, Joseph Cappstick, Daniel Cappstick, Michael Cappstick,*

Angela Cappstick, George McArthy, Marcella McArthy, and Kevin McArthy v. Northeastern Pharmaceutical & Chemical Co., Inc., Edwin Michaels, Milton Turkel, Daniel Schneider, Bernard Bortz, John Tee, Independent Petrochemical Corp., and Russell Bliss (hereinafter referred to collectively as the "underlying lawsuits").

The EPA Lawsuit

29. On or about August 19, 1982, the United States of America filed its First Amended Complaint against Northeastern Pharmaceutical and Chemical Corporation, Inc., Edwin B. Michaels, John W. Lee, Ronald Mills and Syntex Agribusiness, Inc., in the United States District Court for the Western District of Missouri, Southwestern Division (No. 80-SO66-CV-SW) (hereinafter referred to as the "EPA lawsuit"). The lawsuit is now pending in the Southern Division of the Western District of Missouri.

30. A true and accurate copy of the First Amended Complaint on file in the underlying EPA lawsuit is attached hereto as "Exhibit A" and is incorporated herein by reference. The First Amended Complaint shall hereinafter be referred to as the "Complaint".

31. Defendants NEPACCO, Michaels and Lee have all been served with process in the underlying EPA lawsuit.

32. Continental has denied any obligation to defend or indemnify NEPACCO, Michaels or Lee in the underlying action, but has provided NEPACCO, Michaels and Lee with a defense to the above lawsuit with a reservation of rights.

The Cappstick Lawsuit

33. On or about March 7, 1983, John Cappstick, Penny Cappstick, George McCarthy, Marcella McCarthy, and Kevin McCarthy, filed suit against the Northeastern Pharmaceutical and Chemical Corporation, Inc., Edwin Michaels, Milton Turkel, Daniel Schneider, Bernard Bortz, John Lee and Russell Bliss, d/b/a Russell Bliss Drain Oil Services, Inc., in the Circuit Court of the City of St. Louis, Missouri (No. 832-00453) (hereinafter referred to as the "Cappstick lawsuit"). An Amended Petition was filed on or about September 21, 1983 which added Joseph Walter Cappstick, Daniel Patrick Cappstick, Michael Anthony Cappstick, and Angela Sue Cappstick as plaintiffs. A Second Amended Petition was filed on or about October 25, 1983.

34. True and accurate copies of the Petition, the Amended Petition, and the Second Amended Petition on file in the underlying Cappstick lawsuit are attached hereto as "Exhibit B, C and D" respectively, and are incorporated herein by reference. These petitions shall hereinafter be referred to collectively as the "Petition".

35. Defendants NEPACCO, Turkel, Michaels and Lee have all been served with process as defendants in the underlying Cappstick lawsuit.

36. Continental has denied any obligation to defend or indemnify NEPACCO, Turkel, Michaels or Lee in the underlying Cappstick lawsuit, but has provided NEPACCO, Turkel, Michaels and Lee with a defense to the above lawsuit with a reservation of rights.

Absence of Coverage

37. Continental denies that coverage is provided by any of the above referenced policies for any and all of the claims made by plaintiffs against NEPACCO and the other named defendants in the underlying lawsuits.

38. None of the above referenced policies executed and delivered by Continental to NEPACCO provides coverage for NEPACCO and the individual defendants in the underlying lawsuits in that the Petition and the Complaint in those lawsuits allege no "occurrence," within the meaning of the policies, during the period of policy coverage from October 5, 1972 to November 17, 1972. Specifically, the alleged bodily injury or property damage, if any, was neither unexpected nor unintended from the standpoint of the named insured, NEPACCO, and none of the alleged bodily injury or property damage, if any, occurred during the policy period.

39. None of the above referenced policies executed and delivered by Continental to NEPACCO provides coverage for NEPACCO and the individual defendants in the underlying lawsuits in that the Petition and the Complaint in those lawsuits allege no "bodily injury" or "property damage," within the meaning of the policies, during the period of coverage from August 5, 1970 to November 17, 1972. Specifically no bodily injury or property damage within the meaning of the policies has been alleged and none of the alleged bodily injury or property damage, if any, occurred during the policy coverage period.

40. None of the above referenced policies executed and delivered by Continental to NEPACCO provides cov-

erage for NEPACCO and the individual defendants in the underlying lawsuits in that the Petition and the Complaint in those lawsuits set forth claims which fall within the "Products Hazard" exclusion set forth in the policies which excludes coverage for such claims. Specifically, the alleged bodily injury or property damage, if any, arose out of NEPACCO's products, or reliance upon a representation or warranty, or absence thereof, made at any time with respect thereto, and occurred away from the premises owned or rented to NEPACCO and after physical possession of such products had been relinquished to others.

41. None of the above referenced policies executed and delivered by Continental to NEPACCO provide coverage for NEPACCO and the individual defendants in the underlying lawsuits in that the Petition and the Complaint in those lawsuits set forth claims which fall within the "Completed Operations Hazard" exclusion set forth in the policies which excludes coverage for such claims. Specifically, the alleged bodily injury or property damage, if any, arose after all operations to be performed by or on behalf of NEPACCO at the site of the operations had been completed or abandoned and occurred away from the premises owned by or rented to the named insured, NEPACCO.

42. None of the above referenced policies executed and delivered by Continental to NEPACCO provides coverage for NEPACCO and the individual defendants in the underlying lawsuits in that the Petition and the Complaint in those lawsuits seek punitive and/or exemplary damages, recovery of which pursuant to insurance policies is both prohibited and excluded from coverage under the policies.

43. The two policies relating to the time period from August 5, 1971, to November 17, 1972, executed and de-

livered by Continental to NEPACCO provide no coverage for NEPACCO and the individual defendants in the underlying lawsuits in that the Petition and the Complaint in those lawsuits set forth claims which fall within the "Pollution Exclusion" set forth in those policies which excludes coverage for such claims. Specifically, the alleged bodily injury or property damage, if any, arose out of the discharge, dispersal, release or escape of smoke, soot, fumes, acids, alkalis, toxic chemicals, liquid gases, waste materials or other irritants contaminants or pollutants, into or upon land, the atmosphere or any water course or any body of water which was neither sudden or accidental.

44. None of the above referenced policies executed and delivered by Continental to NEPACCO provide coverage for NEPACCO and the individual defendants in the underlying lawsuits in that the Petition and the Complaint in those lawsuits seek relief in the form of injunctive and mandatory affirmative relief for which no coverage is provided.

Right To Declaratory Relief

45. There exists an actual controversy between the parties hereto within the statutes of the United States, Title 28, U.S.C. Chapter 151, § 2201, "Declaratory Judgment." Actual, justiciable issues exist between the parties hereto with regard to the scope of the coverage of the policies issued by Continental to NEPACCO as applied to the claims contained in the Petition and the Complaint in the underlying lawsuits against NEPACCO and the other defendants.

COUNT I

46. The allegations of paragraphs 1 through 45 are hereby incorporated in Count I as though fully set out herein.

47. For Count I of this proceeding, Continental desires a declaratory judgment regarding its duty to defend or indemnify NEPACCO and its officers and directors with regard to claims asserted in the Complaint filed in *United States of America v. Northeastern Pharmaceutical & Chemical Co., Inc., et al.*

48. If any of the above referenced policies of insurance issued by Continental to NEPACCO are effective and cover the claims contained in the Complaint against NEPACCO and its officers and directors, Continental, by the terms of such policies, would be required to defend the claims and would be required by the terms of each such policy to pay, on behalf of NEPACCO, all sums within the policy limits which the insured would become legally obligated to pay, as damages, because of property damage or bodily injury arising therefrom. Continental, in good faith, contends that the policies executed and delivered by it to NEPACCO with regard to the policy periods from August 5, 1970 through November 17, 1972 do not provide coverage for the claims asserted in the Complaint on file in *United States of America v. Northeastern Pharmaceutical & Chemical Co., Inc., et al.*, nor do they provide coverage for any similar claims which might be filed against NEPACCO.

COUNT II

49. The allegations of paragraphs 1 through 45 are hereby incorporated in Count II as though fully set out herein.

50. By this proceeding, Continental desires a declaratory judgment regarding its duty to defend or indemnify NEPACCO and its officers and directors with regard to claims asserted in the Petition on file in *Cappstick, et al. v. Northeastern Pharmaceutical & Chemical Co., Inc., et al.*

51. If any of the above referenced policies of insurance issued by Continental to NEPACCO are effective and cover the claims contained in the Petitions on file in the lawsuits on file in *Cappstick* against NEPACCO and its officers and directors, Continental, by the terms of such policies, would be required to defend the claims and would be required by the terms of each such policy to pay, on behalf of NEPACCO, all sums within the policy limits which the insured would become legally obligated to pay, as damages, because of property damage or bodily injury arising therefrom. Continental, in good faith, contends that the policies executed and delivered by it to NEPACCO with regard to the policy periods from August 5, 1970 through November 17, 1972 do not provide coverage for the claims asserted in the Petition on file in *Cappstick* nor do they provide coverage for any similar claims which might be filed against NEPACCO.

PRAYER FOR RELIEF AS TO COUNTS I AND II

WHEREFORE, Continental prays that this Court determine the rights, obligations and duties of the parties as follows, by entering a declaratory judgment as to Counts I and II with regard to each of the underlying lawsuits:

(a) Declaring that Continental is under no duty or obligation to appear and defend NEPACCO or any of the individual defendants against any of the claims set forth in the Petition and the Complaint in the underlying lawsuits or to assume any liability imposed upon NEPACCO or any of the individual defendants;

(b) Declaring that Continental is under no duty or obligation to appear and defend NEPACCO or any of the individual defendants against any of the claims set forth in the Petition and the Complaint in the underlying lawsuits or to assume any liability imposed upon NEPACCO or any of the individual defendants as a result of such claims, by reason of one or more of the following:

(1) None of the policies executed and delivered by Continental to NEPACCO provides coverage for defendants in that the Petition and the Complaint in the above referenced lawsuits do not allege an "occurrence" within the meaning of the policies, during the period of policy coverage from August 5, 1970 to November 17, 1972;

(2) None of the policies executed and delivered by Continental to NEPACCO provides coverage for defendants in that the Petition and

Complaint in the above referenced lawsuits do not allege "bodily injury" or "property damage," within the meaning of the policies, during the period of coverage from August 5, 1970, to November 17, 1972;

(3) None of the policies executed and delivered by Continental to NEPACCO provides coverage for defendants for the reason that the Petition and the Complaint in the above referenced lawsuits set forth claims which fall within the "Products Hazard" exclusion set forth in the policies which excludes coverage for such claims;

(4) None of the policies executed and delivered by Continental to NEPACCO provides coverage for defendants for the reason that the Petition and the Complaint in the above referenced lawsuits set forth claims which fall within the "Completed Operations Hazard" exclusion set forth in the policies which excludes coverage for such claims;

(5) None of the policies executed and delivered by Continental to NEPACCO provides coverage for defendants for any punitive or exemplary damages which may be imposed on NEPACCO or any of the individual defendants as a result of the claims set forth in the underlying lawsuits;

(6) None of the policies executed and delivered by Continental to NEPACCO provides coverage for defendants for any injunctive or mandatory affirmative relief which may be

awarded against NEPACCO or any of the individual defendants as a result of the claims set forth in the underlying lawsuits; or

(7) The two policies relating to the time period from August 5, 1971, to November 17, 1972, executed and delivered by Continental to NEPACCO provide no coverage for defendant for the reason that the Petition and the Complaint in the above referenced lawsuits set forth claims which fall within the "Pollution Exclusion" set forth in those policies which excludes coverage for such claims.

(c) Declaring that the dioxin produced by NEPACCO was a "product" within the meaning of the policies executed and delivered by Continental to NEPACCO.

(d) Declaring that the disposed of dioxin produced by NEPACCO through the means described in the Petition and the Complaint in the underlying lawsuits was neither unexpected nor unintended from the standpoint of the named insured, NEPACCO.

(e) Declaring that the disposal of dioxin produced by NEPACCO through the means described in the Petition and the Complaint in the underlying lawsuits was accomplished after all operations to be performed by or on behalf of NEPACCO at the Verona, Missouri plant had been completed or occurred away from the premises owned by or rented to the named insured, NEPACCO.

(f) Declaring that uncertainty and mental anguish over the true extent of physical damage to

the person, which is likely to be manifested in the future, is not bodily injury, sickness or disease.

(g) Declaring, in the alternative, that the spraying of dioxin on the streets of Times Beach, Missouri, was one occurrence within the meaning given that term in the three insurance policies issued by Continental to NEPACCO.

(h) Declaring, in the alternative, that the decision by NEPACCO to dispose of the dioxin in the manner in which it was disposed, was one occurrence within the meaning given that term in the three insurance policies issued by Continental to NEPACCO.

Plaintiff prays for its costs and such other and further relief as the Court deems just.

Shook, Hardy & Bacon

By /s/ Gary R. Long
Gary R. Long

By /s/ Peter E. Strand
Peter E. Strand

By /s/ Sandra R. Stigall
Sandra R. Stigall

1101 Walnut, 20th Floor
Kansas City, Missouri 64106
(816) 474-6550
Attorneys for Plaintiff

(Filed November 14, 1984)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 84-5034-CV-S-4

CONTINENTAL INSURANCE COMPANIES,
a New Hampshire Corporation,
Plaintiff,

vs.

NORTHEASTERN PHARMACEUTICAL AND
CHEMICAL COMPANY, INC.
A Delaware Corporation, et al.,
Defendants.

EXCERPTS FROM
SUGGESTIONS IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Gary R. Long
Peter E. Strand
Sandra R. Stigall
SHOOK, HARDY & BACON
1101 Walnut Street
Kansas City, Missouri 64106
Attorneys for Plaintiff
Continental Insurance Companies

Dated: 11/14/84

* * *

[19*] * * * *Insurance Co. v. Universal Underwriters Insurance Co.*, 594 S.W.2d 950, 953-54 (Mo. App. 1980).

Continental respectfully submits that when the foregoing rules of construction are applied to the clear and unambiguous terms of the insurance policies at issue herein, and when the policies are interpreted according to their intended meaning, it is evident that Continental has no duty to indemnify or defend any of the defendants in the underlying lawsuits.

IV. THE POLICIES DO NOT PROVIDE COVERAGE FOR THE CLAIMS MADE IN THE UNDERLYING LAWSUITS

Each of the three CGL policies issued by Continental to NEPACCO incorporates the following basic insuring provision:

> The Company [Continental] will pay on behalf of the insured all sums which the *insured* shall become legally obligated to pay as damages because of A. *bodily injury* or B. *property damage* to which this insurance applies caused by an occurrence, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage. . . .

Continental's duty, if any, to defend and indemnify NEPACCO and the individual defendants in the underlying lawsuits arises only if (a) the prerequisites to coverage set forth in the basic insuring clause are met

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*Numbers in brackets represent original page numbers at the time document was filed.

and (b) such coverage is not excluded by another part of the policy.

Continental has no duty to defend or indemnify the defendants in the underlying lawsuits for the following reasons:

(1) The damages which are alleged in the underlying lawsuits either were not caused by an "occurrence" or were [20] excluded from coverage by the pollution exclusion clause;

(2) The damages alleged in the underlying lawsuits did not occur within any of the three Continental CGL policy periods;

(3) The *EPA* lawsuit is not predicated on insurable "bodily injury" or "property damage;" and

(4) The punitive damages sought in the *Capstick* lawsuit are excluded from coverage.

If the Court determines that one or more of the policies in question does provide some coverage, Continental suggests that the damages alleged in the underlying lawsuits arose from only one occurrence in one policy period and are therefore subject to the per occurrence limit on coverage set forth in each of the underlying insurance policies.

This matter is ripe for resolution by the entry of summary judgment. The pleadings and discovery on file in this matter, together with the affidavit filed herewith, demonstrate that there is no issue of material fact. When applied to the undisputed facts, the applicable law mandates that Continental has no duty to indemnify or defend the defendants in the underlying lawsuits. Accord-

ingly, Continental is entitled to the entry of summary judgment in its favor.

A. The Damages Alleged In The Underlying Lawsuits Were Not The Result Of An Occurrence Or Sudden And Accidental Pollution.

Under each of the Comprehensive General Liability policies issued to NEPACCO by Continental, coverage extends only to bodily injury or property damage resulting from an "occurrence" * * *.

* * *

[29] * * * NEPACCO (EPA Opinion 8). Michaels and Lee knew that NEPACCO's manufacturing process produced by-products that contained toxic substances, including dioxin, which could be harmful to human health (EPA Opinion 6). Prior to the dumping of the NEPACCO waste at the Denney farm site, Lee had defined for Mills the necessary disposal site characteristics, had discussed observations concerning the Denney Farm site with Bill Ray, had approved the use of Mills' services, and had specifically approved the use of the Denney Farm as a disposal site (EPA Opinion 8).

Under Missouri insurance law, both an act and the resulting injuries are considered intentional if the natural and probable consequences of an act are to produce harm. *Truck Insurance Exchange v. Pickering,* 642 S.W.2d 113, 116 (Mo. App. 1982); *Travelers Insurance Co. v. Cole,* 631 S.W.2d 661, 664 (Mo. App. 1982). Based upon the foregoing discussion of the undisputed facts and the applicable law, it is obvious that NEPACCO and its officers intended to dispose of the waste products on the Denney farm site and were certainly aware that the waste prod-

ucts buried in metal barrels in a deteriorated condition could be expected to escape from the barrels and leak into the adjoining soil. Such damages were the natural and probable results of NEPACCO's acts.

Based on the applicable law, the undisputed facts and the plain wording of the Continental CGL policies issued to NEPACCO, the property damage alleged in the *EPA* suit did not result from an insurable "occurrence." The intentional conduct * * *.

* * *

[32] * * * discharge of toxic chemicals and waste materials on land. The pollution exclusion cannot reasonably be interpreted to have any other meaning, nor could the contracting parties have any other expectation. It is also clear that the claims in the *EPA* action are based on the intentional placement of waste containing drums by NEPACCO on the Denney farm site. Likewise, in the *Capstick* action, it is clear that the claims are based on the intentional placement of the chemical wastes on Bubbling Springs Stables and on the streets and roads of Times Beach, Missouri. There was simply nothing "sudden" or "accidental" about the manner in which the chemical wastes were discharged or released in either the *EPA* lawsuit or the *Capstick* lawsuit. If the pollution exclusion does not apply to the undisputed circumstances of these cases, then this exclusion is virtually meaningless. In the very language of the pollution exclusion, these cases both involve an intentional "discharge, dispersal, release or escape of . . . waste materials . . . into or upon land . . . ." Giving the straightforward language of the pollution exclusion a reasonable meaning consonant with the reasonable expectations and

intentions of the parties, no other conclusion can be reached but that it applies to the *EPA* and *Capstick* lawsuits.

In considering the reasonable expectations and intentions of the parties to an insurance contract, particular attention should also be given to the basic *nature* of the claims in the *EPA* action. The particular type of claims and damages asserted in the *EPA* lawsuit could not have been within the con- * * *.

* * *

[38] * * * damage did not occur within the policy periods and Continental has no duty to defend or indemnify its insureds for claims made in the EPA lawsuit.

The Superfund Statute (CERCLA) did not become effective until December 11, 1980. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (Codified at 42 U.S.C. § 9601 (1982) *et seq.*). CERCLA authorizes the government to seek as damages the reimbursement of hazardous waste clean-up costs incurred *after* that date. *See* 42 U.S.C. § 9607 (1982). The statute does not, however, have a specific provision modifying financial responsibilities or duties under laws existing prior to that date (EPA Opinion 26-29). Consequently, CERCLA does not apply retroactively to authorize the government to seek reimbursement of costs incurred prior to December 11, 1980 (EPA Opinion 29). As a matter of law, the only alleged "property damages" in the *EPA* case (i.e., the damages sought by the government in the *EPA* lawsuit for reimbursement of clean-up costs) did not and could not have occurred until after December 11, 1980. As a matter of fact, the USEPA did not begin even investigating the Denney farm site until 1979 (EPA Opinion 9), and the actual clean up, in which the alleged damages were in-

curred, did not begin until 1981 (EPA Opinion 13). The Continental CGL policies issued to NEPACCO provide coverage for "property damage" which occurred only between July 1, 1970 and November 11, 1972, more than eight years prior to the possibility of an "occurrence" resulting from the liability to reimburse the EPA under the Superfund statute. Therefore, Continental has no duty * * *.

* * *

[42] * * * nuisance because of an actual or threatened release of these hazardous substances . . . ." EPA Complaint at ¶ 50;

7. Defendants are liable for "remedying the releases and threatened releases and the consequences thereof at the site . . . ." EPA Complaint at ¶ 51;

8. "Hazardous substances have been released and there is a substantial threat of such releases into the environment . . . which may present an imminent and substantial danger to the public health or welfare . . . ." EPA Complaint at ¶ 55;

9. "The United States has incurred and will continue to incur costs . . . including costs of removal and remedial action at the Denney Farm site . . . ." EPA Complaint at ¶ 58;

10. Defendants are liable for "all costs of removal or remedial action incurred by the United States Government concerning the site . . . ." EPA Complaint at ¶ 59; and

11. Finally, the EPA requests relief in the form of abatement of any imminent and substantial endangerment to health, removal and disposal of all

> contaminated materials, reimbursement of costs of sampling, monitoring, and other actions taken to determine the nature and extent of contamination to the Denney Farm site and surrounding soil, water, air, and ground water, and prevention of future contamination. EPA Complaint, Prayer for Relief at ¶¶ 1-8.

Without question, there has been no insurable "bodily injury" claimed in the *EPA* suit. All damages claimed are in the nature of "clean-up" costs. The complaint in no way alleges the occurrence of any personal injury.

A review of the *EPA* Complaint also mandates a conclusion that there has been no insurable "property damage" claimed. * * *

* * *

[52] * * * either the *EPA* lawsuit or the *Capstick* lawsuit. First and foremost, the claims made in the underlying lawsuits were not the result of sudden and accidental pollution. Consequently, both the pollution exclusion and the occurrence definition preclude coverage and a duty to defend. Additionally, the claims made in the underlying lawsuits did not occur during any of the three Continental policy periods. Therefore, coverage and a duty to defend is precluded by explicit policy requirements limiting coverage in this manner. Finally, the damages alleged in the *EPA* lawsuit do not constitute "property damage" or "bodily injury" as defined in the Continental CGL policies. Because the mere threat of damages does not fall within Continental's policy definitions, Continental has no duty to defend or indemnify NEPACCO or the individual defendants for claims made in the *EPA* lawsuit.

If the Court finds that some coverage does exist, the damages alleged in each of the underlying lawsuits arose from but one occurrence. Courts have unanimously looked to the cause of the accident, rather than the damages which are sustained, in determining the number of occurrences. Applying this rule to the underlying actions, the one occurrence limit of the first policy issued to NEPACCO limits coverage in the *EPA* lawsuit and the one occurrence limit of the second policy issued to NEPACCO limits coverage in the *Capstick* lawsuit. Finally, if some coverage is found to exist for the *Capstick* lawsuit, the punitive damage claim in that action is excluded from coverage. * * *

* * *

ISO

CONFIDENTIAL

Agenda and Minutes - Meeting of the General Liability Governing Committee - October 28, 1969

69-33 OIL CONTAMINATION OR POLLUTION EXCLUSION - OFF SHORE OPERATIONS ONLY

A member company has expressed concern over several off-shore oil spill incidents and the increasing possibility of catastrophe losses being assigned to participants in off-shore oil drilling ventures on the basis of strict liability. An in depth study conducted by underwriting personnel, of the member company and engineers and representatives of the petroleum producing industry has produced the following conclusions:

1. Most oil spills can be avoided if the oil producer is willing to spend more money than is presently allocated to safeguard against spills.
2. Not all spills can be prevented because underwater terrain cannot be surveyed in the way on shore terrain can be.
3. Whether or not negligence exists, damage due to oil spills will be assessed on a strict liability basis.
4. Damages, including cost of clean up, may be catastrophic, but this is unpredictable and not often related to attempts to operate safely. The extent of damage is more closely related to wind direction, wave action, location of valuable property and the time required to bring the best available materials and men to contain the pollution or effect clean up operations.
5. The problem resides with the oil transportation industry as well as with the oil production industry. Acknowledging this to be their problem,

attempts have been made to form pools to insure their members against large losses due to oil spills. At the time, they seem to be indicating that they do not expect the insurance industry to assume their business risk.

Finally, the position of the member company, after study of the conclusions listed, is that coverage should be excluded from general liability policies.

The committee is requested to consider the adoption of an exclusion for use with classifications where the "d" hazard now applies including "Non-Operating Working Interests" code 0301B. Consideration should be given to the application of such an exclusion to operations assigned to "Oil or Gas Wells - acidizing", code 6206 and "Oil or Gas Wells - cementing" code 6206.

The classifications to which the exclusion will apply are listed below:

Classification	Code
Oil or Gas Wells - acidizing	6206
Oil or Gas Wells - cementing	6206
Oil or Gas Wells - cleaning or swabbing - by contractors - within the limits of any town or city, on the right-of-way of any railroad, or in any ocean, gulf or bay	3754ie
Oil or Gas Wells - cleaning or swabbing - by contractors	3492de
Oil or Gas Wells - drilling or redrilling, installation or recovery of casing - within the limits of any town or city, on the right-of-way of any railroad, or in any ocean, gulf or bay	3754de

Classification	Code
Oil or Gas Wells - drilling or redrilling, installation or recovery of casing	3492de
Non-operating working interests	0301B
Oil Lease Operators - within the limits of any town or city, on the right-of-way of any railroad, or in any ocean, gulf or bay	3753de
Oil Lease Operators	1321de

Classifications, other than those suggested by the company, which seemingly, fall within this area though not necessarily carrying the catastrophe exposure represented by the initial grouping of classifications, and which the committee may wish to consider in this connection are:

Classification	Code
Oil Lease Work - by contractors - not lease operation	6216
Oil or Gasoline Dealers	8350x
Oil or Gas Wells - perforating of casing	6214
Oil or Gas Wells - instrument logging or survey work in wells	2475
Oil Pipe Lines - operation, including maintenance	7515Sx
Oil Rig or Derrick Erecting or Dismantling - wood or metal - including construction of foundations or structures or installation of equipment	6209
Oil or Gas Pipe Line Construction	6233xcu

Classification	Code
Tugboats or Supply Boats supplying water or gasoline for shipping	3439s
Barges, scows, canal boats or lighters, or sailing vessels	3441s
Boat Storage and Moorage - including slip or dock rental	3493
Yacht Basins - public	2464

Governing Committee Action

For the reasons given by the member company, the committee agreed that an exclusion should be adopted. It was felt that the exclusion should run to oil contamination or pollution in connection with water since it is in this area that the principle exposure exists and is relatively new. It was felt that the exclusion should not apply to classifications where the exposure was contemplated in the past and where it is not pronounced. A member company distributed copies of an exclusion which it had recently adopted.

Following this discussion

It was duly moved and seconded

THAT the following exclusion be adopted,

> "to property damage arising out of the discharge of oil into any body of water from any exploration, drilling, production, pipeline distribution, storage or refining facilities or from watercraft,"

and apply to the classifications recommended by the company and the following:

Classification	Code
Oil or Gas Wells - perforating of casing	6214
Oil or Gas Wells - instrument logging or survey work in wells	2475
Oil Pipe Lines - operation, including maintenance	7515sx
Oil Rig or Derrick Erecting or Dismantling - wood or metal - including construction of foundations or structures or installation of equipment	6209

The motion was carried unanimously.

[1]

[Insurance Services Office, Inc.]

OCCURRENCE COVERAGE FORM

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

* * *

SECTION I—COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. * * *

* * *

2. Exclusions.

   This insurance does not apply to:

* * *

[2]

   f. * * *

      (2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

      Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

* * *

[Pages 3 through 9 deleted.]

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO

HON. WILLIAM LANAM, JUDGE
DEPARTMENT NO. 6
NO. 278953

SHELL OIL COMPANY,
Plaintiff,

vs.

ACCIDENT AND CASUALTY INSURANCE COMPANY OF WINTERTHUR (SUCCESSOR TO ACCIDENT AND CASUALTY COMPANY),
Defendants.

And Related Cross-Actions.

EXCERPTS FROM REPORTERS' TRANSCRIPT OF PROCEEDINGS MARCH 7, 1988

* * *

[9650*] San Bruno, California

Monday, March 7, 1988; 9:01 A.M.

Department No. 6 Hon. William Lanam, Judge

* * *

(Laurie C. Creighton, Official Reporter)

* * *

*Numbers in brackets represent original page numbers at the time document was filed.

[DIRECT EXAMINATION OF WITNESS RICHARD E. STEWART BY LAURENCE SILVERMAN, ESQ.]

[9673] Q. Mr. Stewart, do you recognize what has been marked as Shell Exhibit 16 as a copy of your curriculum vitae?

A. Yes.

Q. And was the curriculum vitae accurate in April of 1987 when it was first supplied to all defense counsel?

A. Yes.

Q. Have there been any additions to the curriculum vitae since April of '87?

A. One. I am now serving as a member of a special committee of the American Bar Association to improve the liability insurance system.

Q. When did you conclude your tenure as First Assitant Counsel of New York?

A. At the end of 1966. I was then appointed by the governor as Superintendent of Insurance for New York State, and served there for four years.

Q. Can you describe to the court what your responsibilities were as Superintendent of Insurance?

A. I was generally responsible for all of the work of the insurance department, which included regulation for solvency, the approval or—of policy forms and premium rates. And a whole slew of activities having * * *.

* * *

[9690] * * * talked from time to time with the people in the bank who had responsibility for the banking aspects of the insurance industry, such as the Lloyd's American Trust Fund, and also served as a Director of General Reinsurance who was—is the largest U.S. professional reinsurers.

Q. Did you participate in a study conducted by McKenzie consultants during this period?

A. Yes. The N.A.I.C. had commissoned McKenzie to do a general study of how state regulation of insurance could be made more effective, and I was one of McKenzie's side advisors on that.

Q. When did you leave Citibank; what was your next employment?

A. I left at the end of 1972, and in the beginning of 1973 joined the Chubb group of insurance companies as Senior Vice-President and Director, and director of a number of their subsidiary companies.

Q. Why did you leave Citibank to go to Chubb?

A. I'm fascinated by the insurance business. And this isn't much of an answer for a banker, but I find the insurance business more complicated, more difficult and more interesting than commercial banking and certainly as important.

Q. How long did you spend at Chubb?

A. About nine years.

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO

HON. WILLIAM LANAM, JUDGE
DEPARTMENT NO. 6
NO. 278953

SHELL OIL COMPANY,
Plaintiff,

vs.

ACCIDENT AND CASUALTY INSURANCE COMPANY OF WINTERTHUR (SUCCESSOR TO ACCIDENT AND CASUALTY COMPANY),
Defendants.

And Related Cross-Actions.

EXCERPTS FROM REPORTERS' TRANSCRIPT OF PROCEEDINGS MARCH 8, 1988

* * *

[9872] San Bruno, California

Tuesday, March 8, 1988, 9:02 A.M.

Department No. 6 Hon. William Lanam, Judge

* * *

(Paula S. Behmke, Official Reporter.)

* * *

[EXAMINATION OF WITNESS RICHARD E. STEWART BY THE COURT]

[9977] The Court: Let's go back to the discussion of clean up costs that you were involved with in some of your questions.

The Witness: Yes, sir.

The Court: And under C.E.R.C.L.A., were you referring to clean up costs in connection as being within the term response costs or were you treating them as basically synonymous?

The Witness: I guess I was.

The Court: Okay.

In your opinion, clean up costs also known as response costs—although it's a little broader area—would be considered as damages; is that correct?

The Witness: Yes, sir.

The Court: And this would be considered as property damage?

The Witness: Yes, sir.

Or as the—as the measure of property damage.

[9978] The Court: Okay.

The Witness: Measure of damages, I guess.

The Court: Measure of damages would include response costs and clean up costs.

The Witness: Yes, sir.

[9978-9980] [Extended colloquy between the Court and witness concerning coverage pursuant to comprehensive general liability policy under series of hypothetical questions involving gargoyles attached to buildings.]

[9981] The Court: Okay. But would you say it's covered under the provision of a C.G.L. policy for the cost of fastening it back to the roof?

The Witness: No orders, no suits, no nothing.

Again, I think you'll get—you would get—I am not sure. And I think you will get different answers from different people.

I think in the long run it's in everybody's interest that that be compensable because we ought to encourage people to do that and hold down total costs.

The Court: Is it compensable?

The Witness: Don't know, sir.

The Court: It's not.

The Witness: I don't know.

The Court: You don't know.

The Witness: On these facts.

The Court: How do you draw a distinction then? You don't know about this one, but you feel confident about the response costs or clean up costs for C.E.R.C.L.A.

The Witness: Yes, sir.

The Court: What is the difference between the two?

[9982] The Witness: The difference is that under C.E.R.C.L.A. there is a legal liability to clean up. There is a lawsuit brought by the government to force the clean up under the statute which requires the clean up and makes the generator additionally responsible for doing so.

He's—the—this fellow is no volunteer. He has got a gun to his head.

The reason that I want to be cautious about the other example is that there are, in many policies, duties to mitigate, but are expressed to be at your own expense.

The Court: No.

We just have your standard coverage under the C.G.L. without any exceptions.

The Witness: There is no—

The Court: Exclusions.

The Witness: And there is no—there is a duty to mitigate, but it doesn't say at your own expense.

The Court: Well, your duty to mitigate might be a duty under law that may not exist by way of contract and so forth, but you are putting in another provision that we are not dealing with.

The Witness: Then I—I guess I stay with where I was.

I feel that the C.E.R.C.L.A. situation for getting rid of that long-standing pollution, if that's what it was, is so coercive that there is not much question in my mind [9983] that it's a legal obligation.

And since I do not, myself, think we should give any practical weight to old distinctions about common law damages as distinguished from the money cost of putting something right. In any event, then I think there are two—they are two different cases. The C.E.R.C.L.A. case is quite clear and the other one, I am not—not sure of.

The Court: Well, the C.E.R.C.L.A. case is quite clear, if I understand your reasoning, because someone was pointing a gun at somebody's head and directing that they do it.

The Witness: Yes, sir.

* * *

(3)

No. 87-1953

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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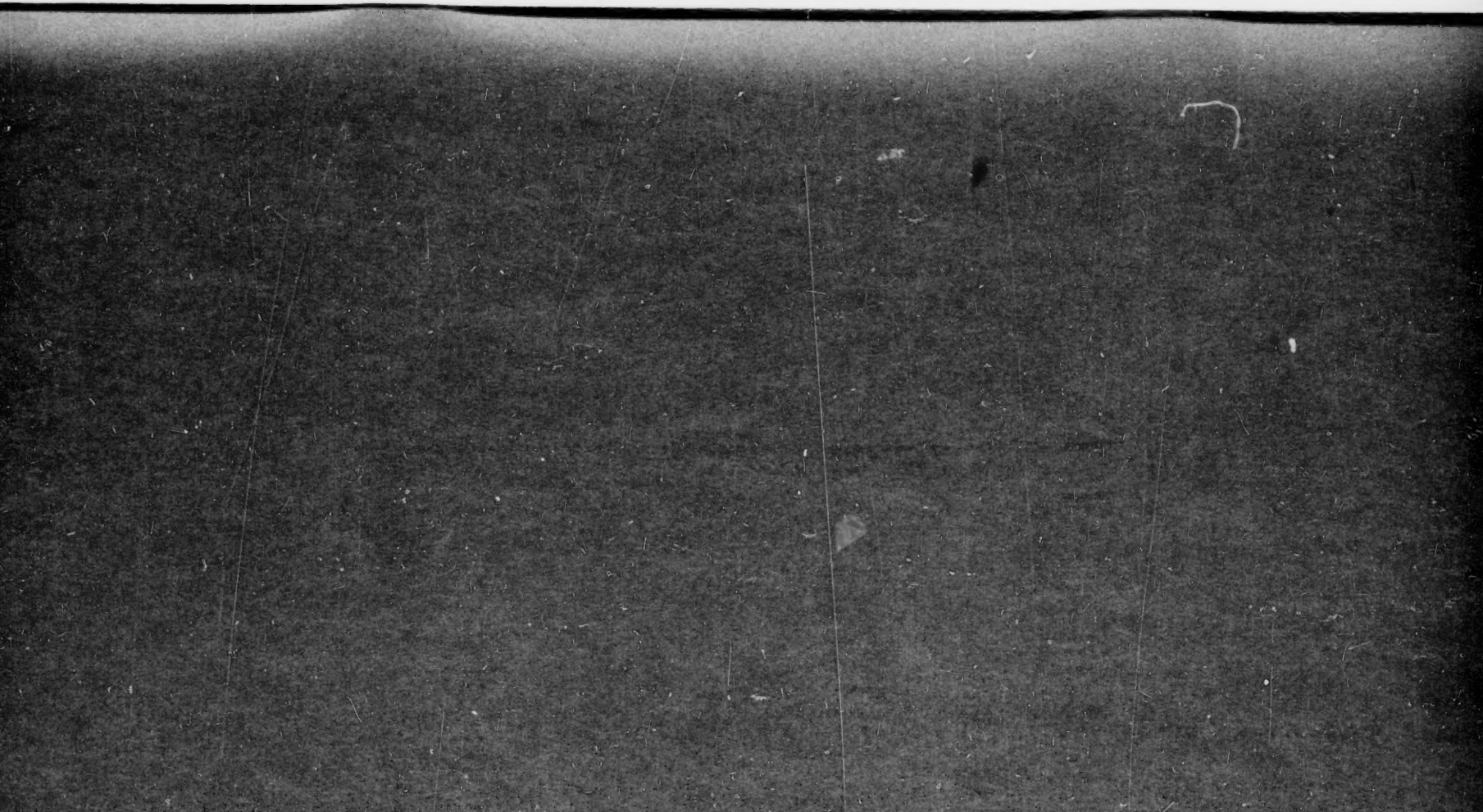

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit sitting in diversity correctly construed the terms of an insurance contract under Missouri law?

RULE 28.1 LISTING

The Continental Corporation
AFCO Acceptance Corporation
AFCO Agent Service Corporation
AFCO Credit Corporation
AFCO Service, Inc.
Aljazirah Insurance Company Limited (The)
Alte Leipziger Versicherung AG
American Title Insurance Company
Amtitle Company
Amtitle Trust Company
Associated Aviation, Inc.
Associated Title Services, Inc.
BHC Seguros de Vida
BHC Seguros Generales
Bayside Management Co.
Bayside Management Company Limited
Bayside Reinsurance Co. Ltd.
Bishophouse Limited
Boston Old Colony Insurance Company
Buckeye Union Insurance Company (The)
Buckhot, Inc.
Buffalo Reinsurance Company
CAFO, Inc.
Casualty Insurance Company
Cenguard Holding Corp.
Cenguard Insurance Corp.
CIC Acceptance Corporation
CIC Administrative Services, Inc.

CIC Asset Management Corporation
CIC Financial Corporation
Columbia Real Estate Title Insurance Company
Commercial Afianzadora, S.A.
Commercial Aseguradora Suizo Americana, S.A. (CASA)
Commercial Insurance Company of Newark, N.J.
Commercial Life Insurance Company
Continental Center Associates
Continental Holdings (Bermuda) Ltd.
Continental Holdings, Ltd.
Continental Corporation (The)
Continental Hellas Insurance Company S.A. (The)
Continental Insurance Company (The)
Continental Insurance Company of Canada (The)
Continental Insurance Company (Europe) Ltd. (The)
Continental Insurance Company of New Jersey (The)
Continental Insurance Company (U.K.) Ltd. (The)
Continental International Life Insurance Company
Continental Life Insurance PLC
Continental Life (International) Ltd.
Continental National Life Insurance Company
Continental Pensions PLC
Continental P.H.I. PLC
Continental Reinsurance Corporation
Continental Reinsurance Corporation (Bermuda) Ltd.
Continental Reinsurance Corporation (U.K.) Limited
Continental Risk Services, Inc.
Continental Risk Services, Ltd. (Bermuda)
Continental Risk Services (Cayman) Ltd.
CPI Group Inc. (The)

CPI Pension Services Inc.
Ctek, Inc.
C&W Title Insurance Company
Deutsche Continental Reinsurance, A.G.
Dominion Insurance Corporation (The)
Federal Underwriters General Agency, Inc.
Fidelity and Casualty Company of New York (The)
Firemen's Insurance Company of Newark, New Jersey
First Fire & Casualty Insurance Company of Hawaii
First Indemnity Insurance Company of Hawaii
First Insurance Company of Hawaii, Ltd.
General Financial Insurance Corporation
Glen Falls Insurance Company (The)
Global Marine Services, Ltd.
Gulf Stream Title Co. of Miami
Hallmark Insurance Company
Harbor Insurance Company
Hull & Cargo Surveyors, Inc.
Insurnet, Incorporated
International Central Bank & Trust Corporation
International Trust Corporation of Illinois
Ivanhoe Reinsurance Co. Limited (The)
Ivanhoe Reinsurance Co., Limited (Bermuda) (The)
Kansas City Fire and Marine Insurance Company
La Intercontinental de Seguros, S.A.
Land Title Company of Florida, Inc.
La Venezolana De Seguros S.A.
Lombard Insurance Companies
Lombard Insurance Group, Inc.
Loyalty Life Insurance Company

J. M. Lydgate California, Inc.
J. M. Lydgate, Limited
Maiden Lane Life Insurance Company
Maiden Lane Syndicate Inc. (The)
Marine Office of America Corporation
Marine Office of America Corporation (Canada)
Marine Office of America Corporation (U.K.) Ltd.
Mayflower Insurance Company, Ltd. (The)
National-Ben Franklin Insurance Company of Illinois
National Life Assurance Company of Canada (The)
Niagara Fire Insurance Company
Pacific Insurance Company
Pan American Finance Company
PanFinancial Insurance PLC
Phoenix Brasileira CIA de Seguros Gerais
Phoenix Continental, S.A.
Phoenix Continental Management Limited
Phoenix Latino, S.A.
Phoenix of Jamaica Assurance Co., Ltd.
Preferred Risk Insurance Company
Promotora Continental, S.A.
Puerto Rican-American Corporation
Puerto Rican-American Insurance Company
Puerto Rican-American Life Insurance Company
Puerto Rican Insurance Agency, Inc.
Revolution Oil Corporation
S & C Purchasing Corporation
Saudi Continental Insurance Company, E.C.
SCH Realty Leasing Company
Security National Life Insurance Company

Seguros Universales, S.A.
Servicios Continental, S.A.
Servicios, y Comisiones Continental S.A. de C.V.
Societe Nouvelle D'Assurances Du Cameroun (S.N.A.C.)
South Place Syndicate Inc.
Special Risk Syndicate Inc.
Sud Atlantica Compania De Seguros, S.A.
TCC Acquisition Corp.
TCC Properties Inc.
The 180 Group, Inc.
Title Insurance Corporation of Pennsylvania (The)
UAC Rehabilitation International, Inc.
UAC Services Ltd.
Underwriters Adjusting Company
Underwriters Adjusting Company (New York)
Unionamerica Insurance Company, Ltd.
Unionamerica Management Co. Limited
United States P & I Agency, Inc.
Verzekering Maatschappij Minerva N.V. Phoenix
William Penn Life Assurance Company of America
William Penn Life Insurance Company of New York.

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No. 87-1953

In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a declaratory judgment action brought under the district court's diversity jurisdiction. It requires the interpretation of three virtually identical Comprehensive General Liability ("CGL") insurance policies negotiated between Continental Insurance Companies ("Continental") and Northeastern Pharmaceutical and Chemical Company, Inc. ("NEPACCO"). The policy periods ran from

August 5, 1970 to August 5, 1971, August 5, 1971 to August 5, 1972 and from August 5, 1972 to November 17, 1972. In the CGL policies, Continental agreed, among other things, to pay on behalf of the insured, NEPACCO, all sums which NEPACCO should become legally obligated to pay as damages because of bodily injury or property damage. Complaint for Declaratory Judgment ¶ 15, *Continental Insurance Cos. v. NEPACCO*, No. 84 5034-CV-S-4 (W.D. Mo. filed June 25, 1985). (Pet. App., pp. 91-92).

In 1982, the United States of America sued NEPACCO and others, including former officers and directors of NEPACCO, pursuant to Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6973, and Sections 104, 106(a) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9604, 9606(a) and 9607(a), alleging that they had caused an "endangerment to health and the environment". First Amended Complaint ¶ 1, *United States v. Northeastern Pharmaceutical & Chemical Co. Inc., et al.*, No. 80-5066-CV-SW (W.D. Mo.) (the *"EPA"* lawsuit). The State of Missouri was not a party to the *EPA* lawsuit. Continental denied any obligation to defend or indemnify NEPACCO or its directors or officers in the *EPA* action, but provided NEPACCO and the defendant officers and directors with a defense to such lawsuit under a reservation of rights.

In January 1984, the United States District Court for the Western District of Missouri held NEPACCO and several other defendants strictly liable for cleanup costs under CERCLA, but not under RCRA. *United States v. NEPACCO*, 579 F. Supp. 823, 845 (W.D. 1984). On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision as to liability

under CERCLA but held that the defendants were also liable under RCRA. *United States v. NEPACCO*, 810 F.2d 726, 741 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

In 1983, the State of Missouri (the "State") sued NEPACCO and other defendants, seeking declaratory judgment and recovery of present and future response costs ("cleanup costs") pursuant to CERCLA and the common law of public nuisance, in relation to the State's cleanup of a certain site. *Missouri v. Independent Petrochemical Corp.*, No. 83-2670-C (E.D. Mo. filed Nov. 23, 1983) (*IPC*).

To obtain certainty as to its obligations concerning the *EPA* case, Continental brought this action in February of 1984 against NEPACCO and its directors and officers in the United States District Court for the Western District of Missouri, invoking that court's diversity jurisdiction. In November 1984, Continental filed a motion for summary judgment.

In December 1984, the State of Missouri sought leave to intervene in Continental's declaratory judgment action, which was granted by the district court in January 1985. The State filed a counterclaim against Continental for recovery of the State's cleanup costs in the *IPC* case. In March 1985, the State filed its suggestions in opposition to Continental's motion for summary judgment.

In June 1985, the district court entered summary judgment in favor of Continental relating to recovery of the cleanup costs sought in the *EPA* lawsuit and on the State's counterclaim relating to recovery of cleanup costs in the *IPC* lawsuit.

A panel of the United States Court of Appeals for the Eighth Circuit reversed the district court's decision as to Continental's coverage liability for the *EPA* cleanup costs.

It affirmed, however, the district court's decision in favor of Continental relating to the *IPC* lawsuit.[1]

Upon rehearing *en banc*, the Eighth Circuit Court of Appeals, in a five-to-three decision, affirmed the district court's order of summary judgment in favor of Continental, holding that in the insurance context, the word "damages" is an unambiguous term which does not include claims for equitable relief. *Continental v. NEPACCO*, 842 F.2d 977, 985 (8th Cir. *en banc* 1988). (Pet. App., p. 18). The Eighth Circuit denied the State's motion for re-rehearing *en banc*.

The State of Missouri then petitioned for a writ of certiorari, seeking review in this Court of the Eighth Circuit's ruling *en banc*.

SUMMARY OF ARGUMENT

The writ should be denied. This diversity case presents a state law question of private contract interpretation, over which the exercise of this Court's certiorari power is neither appropriate nor necessary. The interpretation under Missouri law of the terms of the parties' negotiated insurance policy is far removed from the role of this Court.

Neither of the claimed questions presented for review by the State fall within the considerations governing review on certiorari by this Court as set forth in Rule 17 of

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1. The Eighth Circuit held that Continental was under no duty to defend or indemnify NEPACCO for liability arising out of the *IPC* lawsuit because the initial deposition of alleged toxic substances had first occurred on the site in question in 1974, two years after the third CGL policy had been cancelled. *Continental v. NEPACCO*, 811 F.2d 1180, 1192 (8th Cir. 1987). This ruling was not disturbed by the Eighth Circuit *en banc*.

the Supreme Court Rules. The ruling of the Eighth Circuit Court of Appeals in this case in no way involves a federal question, as referred to in Rule 17.1(a) and (c). Additionally, the State has not claimed that in reaching its opinion, the Eighth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . ." as set forth in Rule 17.1(a). Finally, the State does not and cannot claim that the decision of the Eighth Circuit is in conflict with a decision of another federal court of appeals on the same matter, as provided in Rule 17.1(a). In fact, this Court recently denied a petition for a writ of certiorari in a remarkably similar case in which the United States Court of Appeals for the Fourth Circuit reached an identical ruling, under Maryland law. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988).

The State attempts to bypass the traditional rule that this Court will not review federal appellate decisions on questions of state law by raising a well settled issue of federal procedure. It argues that the Eighth Circuit improperly affirmed summary judgment in favor of Respondent by relying on a ground not addressed by the district court. The propriety of the Eighth Circuit's action is an issue which has long been settled by this Court and followed with uniformity by all circuits and is therefore not worthy of review.

The State similarly attempts to raise a procedural issue by arguing that the Eighth Circuit should have remanded this case to the district court so that evidence could be taken as to the meaning of the term "damages" in the insurance policies in question. In apparent support of this argument, the State cited in its Petition and included in

its Appendix various materials which were not part of the record in the district court and are simply selective excerpts of irrelevant discussions and proceedings totally unrelated to this case. Not only is the submission of these extra-record materials impermissible as a matter of procedure, they are also irrelevant and inadmissible, as a matter of law, on the issue on which they are offered. It is well settled that extrinsic evidence cannot be used to create an ambiguity where none exists, but only to interpret an ambiguity where one exists. The Eighth Circuit has already determined that no such ambiguity exists.

The State's final effort to fashion an issue worthy of certiorari is equally unavailing. It argues that the Eighth Circuit's decision deprives it of the possibility to replenish its waste remedial fund at the expense of Continental. (Petition at 23). The State also claims that the Eighth Circuit's decision must be reversed as a matter of national policy because it encourages insurance companies to deny coverage nationwide. (*Id.* at 23-24). The State's argument has no rational basis. Plainly stated, the State asks this Court to espouse the standard that, no matter what the law is, the "deep pocket" should always have to pay. The interpretation of contractual agreements, however, is governed by the law, and not by irrelevant claims as to the respective financial positions of the contracting parties.

The State of Missouri suggests no reason why this Court should review the Eighth Circuit's decision affirming summary judgment in favor of Continental. There is none.

THE WRIT SHOULD BE DENIED

I. The Interpretation Under State Law of a Comprehensive General Liability Insurance Policy Negotiated Between Two Private Parties Is Not an Issue Warranting Certiorari.

This is a diversity case in which the United States Court of Appeals for the Eighth Circuit and the United States District Court for the Western District of Missouri interpreted, under Missouri law, the terms of an insurance contract negotiated between NEPACCO and Continental. Although the Eighth Circuit affirmed the district court's decision on a different ground, it expressly grounded its decision on the insurance law of the State of Missouri. In doing so, the Eighth Circuit squarely followed the doctrine expressed in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The *Erie* doctrine does not require a federal court sitting in diversity to adopt one of the parties' position. It simply requires the court to declare what it believes the state law is, as expressed by the highest court of that state, or would be on a question which has not been ruled upon by the state supreme court. This is exactly the rule that the Eighth Circuit applied. It commented at length on Missouri law before reaching its conclusion. *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 983-86 (8th Cir. *en banc* 1988). (Pet. App., pp. 13-17).

This Court repeatedly has stressed that its role is not to review federal appellate courts' decisions on matters of state law. *E.g., Cort v. Ash*, 422 U.S. 66, 73-74 n.4b (1975); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *Hudleston v. Dwyer*, 322 U.S. 232, 237 (1944). There is no reason to depart from that traditional rule here. This Court has

consistently denied certiorari in insurance coverage disputes governed by state law and arising in diversity cases.[2] In fact, very recently, this Court refused to review a case presenting the identical issue and reaching the identical result regarding the interpretation of the term "damages" in an insurance policy, under the law of Maryland. In interpreting identical policy language, the Fourth Circuit held that the term "damages" did not afford coverage for a lawsuit seeking equitable, injunctive and restitutionary relief pursuant to CERCLA and RCRA. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988). Under the Court's longstanding approach, this case likewise does not warrant certiorari.

II. The Propriety of the Eighth Circuit Affirming on a Different Ground the District Court's Summary Judgment Is a Settled Issue Which This Court Has No Reason to Review.

The Eighth Circuit *en banc* affirmed the district court's summary judgment in favor of Continental on the ground that in the insurance context, the term "damages" has an unambiguous meaning which covers legal damages and not cleanup costs which are equitable in nature. *Continental Insurance Cos. v. NEPACCO*, 842 F.2d 977, 985 (8th Cir. *en banc* 1988). Although this particular issue was not

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2. *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, ... U.S. ....., 107 S. Ct. 940 (1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1009 (1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

addressed by the district court, the Eighth Circuit held that the issue was properly before it.

It is a well-settled rule that if the decision of the court below is correct, the reviewing court must affirm it, even if on different grounds than those relied upon by the lower court. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). This rule applies to review of summary judgments: "[t]he appellate court does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law. . . ." 10 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2716 (1983). In this case, the Eighth Circuit has made a routine application of a principle of appellate procedure followed by all federal appellate courts. *Kuehn v. Garcia*, 608 F.2d 1143, 1146 (8th Cir. 1979); *United States Gypsum Co. v. Greif Brothers Cooperage Corp.*, 389 F.2d 252, 262 (8th Cir. 1968) (citations omitted).[3] The State offers no reason why this well-settled rule should be reconsidered by this Court. There is none.

In its petition, the State basically argues the merits of the Eighth Circuit's decision. This is not the proper time or stage of these proceedings to make such argument. Even on the merits of the case, however, the Eighth Circuit's decision is clearly correct. The rules of construction of an insurance contract require that its language be

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3. *See also Gimix, Inc. v. J S & A Group, Inc.*, 699 F.2d 901, 904 (7th Cir. 1983); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 359 (7th Cir. 1983); *Herm v. Stafford*, 663 F.2d 669, 684 (6th Cir. 1981); *Reynolds v. United States*, 643 F.2d 707, 710 (10th Cir. 1981); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 682 (9th Cir. 1976).

given its plain meaning and if the language is unambiguous, the contract must be enforced according to such language. *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695, 698 (Mo. *en banc* 1982). Whether the language of a contract is unambiguous is a question of law for the court. *In re Bergmann v. Bergmann*, 740 S.W.2d 215, 216 (Mo. App. 1987); *Busch & Latta Painting v. State Highway Com'n*, 597 S.W.2d 189, 197 (Mo. App. 1980). If the court finds the contract unambiguous, the court will state the contract's meaning as a matter of law. *Busch & Latta Painting v. State Highway Com'n, supra*, at 198. In the insurance context, courts generally agree that under liability insurance policies the word "damages" has an accepted technical meaning in law which does not cover equitable and restitutionary relief. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988); *Aetna Casualty & Surety Company v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955). This position is followed by a majority of federal and state courts.[4] Therefore, the

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4. *Battisti v. Continental Cas. Co.*, 406 F.2d 1318, 1320 (5th Cir. 1969) (noting limitation on coverage to suits "seeking damages" in case where complaint amended to add prayer for damages); *National Ins. Co. v. King*, 673 F. Supp. 384, 387 (S.D. Cal. 1987) (no duty to defend claims for equitable or restitutionary relief); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601, 604, 606 (D. Utah 1982) (insurers' contractual duties extend to damage claims and "not to claims seeking an injunctive form of relief"); *Board of County Comm'rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 408 (D. Colo. 1981) (no coverage for attorneys fees in suit for declaratory and injunctive relief); *County of Suffolk v. Royal Globe Ins. Co.*, 1981 Fire & Casualty Cas. (CCH) 1457, 1459 (E.D.N.Y. 1981). Insurer had a duty to defend because plaintiffs sought damages, not injunctive relief); *City of Thief River Falls v. United Fire & Casualty Co.*, 336 N.W.2d 274, 275-76 (Minn. 1983) (no coverage for suit seeking mandamus); *O'Neill Investigations, Inc. v. Illinois*

(Continued on following page)

Eighth Circuit properly found that, under Missouri law, the term "damages" in a CGL insurance contract has an unambiguous meaning, and does not cover equitable claims for cleanup costs.

III. Extrinsic Evidence Cannot Be Used to Create an Ambiguity Where None Exists.

In addition to arguing the merits of the Eighth Circuit's decision, the State also argues that the Eighth Circuit improperly affirmed summary judgment because the case should have been remanded to the district court to receive evidence on the meaning of the term "damages." (Petition at 13-15). Further, while recognizing that this Court "is not the appropriate forum in which to present

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Footnote continued—

Employers Ins., 636 P.2d 1170, 1177 (Alaska 1981) (no coverage for suit for injunctive relief and restitution); *Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 504 P.2d 1139, 1143 (Wa. *en banc* 1973) (no coverage for suit for injunctive relief and restitution); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (N.H. 1954) (no coverage for costs of complying with mandatory injunction); *International Mineral and Chem. Co. v. Liberty Mut. Ins. Co.*, No. 84-L-50979 (Cir. Ct. Cook Cty. Ill., Jan. 6, 1987), *aff'd*, No. 87.0505 (Ill. App. 1 Dist. March 25, 1988) (no coverage for equitable CERCLA claims); *Jaffe v. Crawford Ins. Co.*, 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (1985) (no coverage for suit seeking restitutionary payment); *Gulf & Western Indus., Inc. v. Seaboard Sur. Co.*, 100 A.D.2d 820, 474 N.Y.S.2d 754, 755 (1st Dept. 1984), *appeal dismissed*, 63 N.Y.2d 675, 494 N.Y.S.2d 1060, 484 N.E.2d 1058 (1984), *reargument denied*, 63 N.Y.2d 771, 494 N.Y.S.2d 1030, 484 N.E.2d 1054 (1984) (no coverage for costs of complying with injunctive provisions of consent judgment); *Board of Ed. v. Country Mut. Ins. Co.*, 121 Ill. App. 3d 124, 459 N.E.2d 273 (1984) (no coverage in suit for writ of mandamus and injunctive relief); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 391 N.E.2d 568, 573 (1979) (no coverage for suit seeking injunction directing insured to remove debris encroaching on railroad's right-of-way); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So.2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery).

new evidence to resolve this factual dispute" (Petition at 15, n.22), the State nevertheless submits and argues the contents of unauthenticated materials which were not part of the district court record below. In so doing, the State ignores the rule that the record on appeal is composed of the original papers and exhibits filed in the district court. *Rebuck v. Fogel*, 713 F.2d 484, 486 (8th Cir. 1983); *see also, United States v. Drefke*, 707 F.2d 978, 983 (8th Cir. 1983). For these reasons, Continental objects to the attempted use of these materials by the State, which are all selective and unauthenticated excerpts of irrelevant discussions and proceedings totally unrelated to this case.[5]

The State apparently offers these materials on the "factual issue" of the definition of the term "damages" in the insurance policies in question. In its *en banc* decision of February 26, 1988, the Eighth Circuit ruled, as a matter of law, that the term "damages" in the insurance context is unambiguous. (Pet. App., p. 18). Under Missouri law, whether a contract is ambiguous is a question of law for the court. *In re Bergmann v. Bergmann*, 740 S.W.2d 215, 216 (Mo. App. 1987). Once the court finds that a contract is unambiguous, extrinsic evidence may not be introduced as to the terms of such contract and must be disregarded as a matter of law. *Southgate Bank & Trust Co. v. Axtell*, 710 S.W.2d 247, 253 (Mo. App. 1986), citing *Harper v. Calvert*, 687 S.W.2d 227, 230 (Mo. App.

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5. The materials cited by the State and included in its appendix, which were not part of the record in the district court below, are: (1) Agenda and Minutes—Meeting of the General Liability Governing Committee—October 28, 1969 (Pet. App., pp. 115-119); (2) Commercial General Liability Coverage Form (Pet. App., p. 120); (3) Excerpts From Reporters' Transcript of Proceedings, March 7, 1988 (Pet. App., pp. 121-123); and (4) Excerpts From Reporters' Transcript of Proceedings, March 8, 1988. (Pet. App., pp. 124-127).

1984). This is of particular application to insurance contracts. *Hartford Accident & Indemnity Co. v. Farmington Auction, Inc.*, 356 S.W.2d 512, 520 (Mo. App. 1961). The attempted submission of these extra-record materials by the State is not only procedurally improper, the materials are irrelevant and inadmissible as a matter of law. Notwithstanding the procedural and substantive impropriety of the State's argument on this point, it completely fails to raise an issue warranting certiorari.

IV. The State's Suggestion That the Eighth Circuit's Decision Should Be Reversed As a Matter of National Policy Is Totally Without Merit or Substance.

Failing to provide this Court with any ground for certiorari on the basis of interpretation of a state law issue, the State of Missouri complains of a purported conflict between the Eighth Circuit's decision and the interest of other states and the federal government.

The State's complaint is twofold. First, it argues that because parties liable for the environmental pollution are in many cases defunct, "[u]nder the Eighth Circuit's interpretation of the term 'damages' in the standard-form CGL insurance policy, . . . potential sources of reimbursement suddenly have evaporated". (Petition at 23). In addition, the State complains that the Eighth Circuit's decision may produce a uniform result nationwide because it "already is being cited by insurance companies throughout the nation seeking to avoid providing coverage under the standard-form policies they issued to companies" liable for cleanup costs. (Petition at 23-24). The State urges that it is "improper and unfair" to allow the Eighth Circuit's decision to stand. (*Id.* at 24).

Not only is the State's argument a blatant invitation to judicial social engineering, it also ignores the implications of the *Erie* doctrine. In essence, the State asks this Court to dispense with the terms of contracts and with contract law standards to formulate a "deeper pocket" standard obliging insurance companies to financially support the State. Under the State's approach, no matter what the terms of a contract are or what the law is, any "potential sources of reimbursement" should have to pay. Merely restating the State's argument illustrates its fallacy.

Furthermore, the State's assertion that the Eighth Circuit's decision has a "potentially widespread effect" (Petition at 24, fn. 34) is ill-founded. The Eighth Circuit's decision merely applied Missouri law to the terms of the insurance policies before it. Other state or federal courts asked to determine the same or a similar issue will make decisions based upon applicable state law and insurance policies before them.

In essence, the State treats the Eighth Circuit's decision as if it were the first of its kind and an exceptional one. However, at least four state supreme courts,[6] intermediate appellate courts in four other states,[7] and, in addi-

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6. *City of Thief River Falls v. United Fire & Casualty Co.*, 336 N.W.2d 274, 275-76 (Minn. 1983) (no coverage for suit seeking mandamus); *O'Neill Investigations, Inc. v. Illinois Employers Ins.*, 636 P.2d 1170, 1177 (Alaska 1981) (no coverage for suit for injunctive relief and restitution); *Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 504 P.2d 1139, 1143 (Wa. *en banc* 1973) (no coverage for suit for injunctive relief and restitution); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (N.H. 1954) (no coverage for costs of complying with mandatory injunction).

7. *International Mineral and Chem. Co. v. Liberty Mut. Ins. Co.*, No. 84-L-50979 (Cir. Ct. Cook Cty. Ill., Jan. 6, 1987),

(Continued on following page)

tion to the ruling in this case, at least six other federal courts,[8] including the United States Court of Appeals for the Fourth Circuit,[9] support the finding, as expressed by the Eighth Circuit that "black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." *Continental Insurance Cos. v. NEPACCO.* (Pet. App., p. 18). Far from

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Footnote continued—

aff'd, No. 87.0505 (Ill. App. 1 Dist. March 25, 1988) (no coverage for equitable CERCLA claims); *Jaffe v. Crawford Ins. Co.*, 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (1985) (no coverage for suit seeking restitutionary payment); *Board of Ed. v. Country Mut. Ins. Co.*, 121 Ill. App. 3d 124, 459 N.E.2d 273 (1984) (no coverage in suit for writ of mandamus and injunctive relief); *Gulf & Western Indus., Inc. v. Seaboard Sur. Co.*, 100 A.D.2d 820, 474 N.Y.S.2d 754, 755 (1st Dept. 1984), *appeal dismissed*, 63 N.Y.2d 675, 494 N.Y.S.2d 1060, 484 N.E.2d 1058 (1984), *reargument denied*, 63 N.Y.2d 771, 494 N.Y.S.2d 1030, 484 N.E. 2d 1054 (1984) (no coverage for costs of complying with injunctive provisions of consent judgment); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 391 N.E.2d 568, 573 (1979) (no coverage for suit seeking injunction directing insured to remove debris encroaching on railroad's right-of-way); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So.2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery).

8. *Battisti v. Continental Cas. Co.*, 406 F.2d 1318, 1320 (5th Cir. 1969) (noting limitation on coverage to suits "seeking damages" in case where complaint amended to add prayer for damages); *Aetna Cas. & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (no coverage for suit seeking injunctive relief); *National Ins. Co. v. King*, 673 F. Supp. 384, 387 (S.D. Cal. 1987) (no duty to defend claims for equitable or restitutionary relief); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601, 604, 606 (D. Utah 1982) (insurers' contractual duties extend to damage claims and "not to claims seeking an injunctive form of relief"); *Board of County Comm'rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 408 (D. Colo. 1981) (no coverage for attorneys fees in suit for declaratory and injunctive relief); *County of Suffolk v. Royal Globe Ins. Co.*, 1981 Fire & Casualty Cas. (CCH) 1457, 1459 (E.D.N.Y. 1981) (the insurer had a duty to defend because plaintiffs sought damages not injunctive relief).

9. *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, ... U.S. ....., 108 S. Ct. 703 (1988).

setting new legal standards, the Eighth Circuit has merely followed traditional insurance law found both in Missouri and elsewhere.

CONCLUSION

For all the reasons set forth above, the State of Missouri's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 87-1953

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In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., et al.,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

PETITIONER'S REPLY BRIEF

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I. THE EIGHTH CIRCUIT JEOPARDIZED THE ABILITY OF STATE AND FEDERAL GOVERNMENTS TO RECOVER RESPONSE COSTS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT IN A MANNER WHICH CIRCUMVENTS FUNDAMENTAL PRINCIPLES OF JUSTICE.

Petitioner seeks review of the Eighth Circuit's opinion in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., et al.*, 842 F.2d 977 (8th Cir. 1988) (*en banc*) (*"NEPACCO"*). The underlying action represents the effort of 139 insurance companies to deny the State of Missouri the opportunity to recover its environmental response costs under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), permits state and federal governments to recover environmental response costs from parties responsible for the contamination. Frequently, as in *NEPACCO*, responsible parties' insurers are the only solvent parties from which governments may recover their costs. The Eighth Circuit's opinion forecloses that option, jeopardizing the ability of state and federal governments to recover environmental clean-up costs.

Respondent asserts this case is not worthy of review because this Court has denied review in insurance coverage cases. The issues presented in this petition, however, involve important fundamental principles unrelated

to insurance coverage. As discussed below, the Eighth Circuit reached its important decision in a manner which exceeded the bounds of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), by denying the State an opportunity to be heard, and which defied *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), by imposing the substantive law of other jurisdictions on the State of Missouri. Missouri state courts will never have the opportunity to state the correct application of Missouri law to CERCLA cost recovery claims because such claims arise under federal law and related insurance claims typically are brought in, or removed to, federal courts based on diversity of citizenship. This decision will affect not only insurance coverage cases, but also other diversity actions and summary judgment proceedings in the federal courts.

Moreover, "similar" cases cited by Respondent are not dispositive. Four of the six cases did not involve summary judgment.[1] These courts reviewed the district courts' finding *after* a thorough inquiry into interpretation of the policy terms. The other two cases support the State's position that the affirmance of summary judgment is proper only after the necessary factual record has been established.[2]

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1. *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins.*, 682 F.2d 12 (1st Cir. 1982); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Insurance Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980).

2. *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1052 (D.C. Cir. 1981) (reversal of summary judgment because insufficient facts to permit interpretation of the insurance policy term); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986) (court certified contract interpretation issue to the Indiana Supreme Court for proper resolution).

II. THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S SUPERVISION.

Supreme Court Rule 17.1(a) permits this Court to grant a writ of *certiorari* when a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." The Eighth Circuit so acted in two important respects: (A) it did not comply with *Erie* and (B) it affirmed summary judgment, without a hearing or affording the parties an opportunity to submit relevant materials, on a basis unsupported by the record.

A. THE EIGHTH CIRCUIT VIOLATED ITS DUTY UNDER ERIE AND IMPOSED THE LAW OF FOREIGN JURISDICTIONS ON THE STATE OF MISSOURI.

Respondent notes that this Court does not review federal appellate courts' decisions on matters of state law. The State does not challenge the Eighth Circuit's *interpretation* of state law.[3] The State seeks review of the Eighth Circuit's failure to *apply* that law.

The Eighth Circuit noted that outside the insurance context, the term "damages" is ambiguous and, from the viewpoint of the lay insured, "damages" reasonably could

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3. Indeed, the Court of Appeals correctly stated the relevant law of Missouri reciting that "language used will be viewed in light of the meaning that would ordinarily be understood by the lay [person] who bought and paid for the policy." Appendix to Petition for Writ of *Certiorari* at A17.

include all monetary claims. Appendix to Petition for Writ of *Certiorari* at A17-18. Missouri law required the court to view the term "damages" in light of that meaning.

The Eighth Circuit held nevertheless that the term "damages" has an accepted technical meaning in the insurance context which is not ambiguous and which excludes environmental cost recovery claims. The court applied that technical meaning to the contracts at issue. The court cited only the law of Maryland, Florida and New Hamphire to support its conclusion. Appendix to Petition for Writ of *Certiorari* at A18. It is inconceivable that the Eighth Circuit's holding could be construed as an application of Missouri law, nor may the court's conclusion realistically be characterized as a declaration of what the court believes the state law to be.

Unless this Court issues the requested writ, this application of foreign law to Missouri will forever go uncorrected. Because such actions typically arise in or are removed to federal courts, the State will be powerless to seek recovery in state courts.

B. THE EIGHTH CIRCUIT DENIED THE STATE THE OPPORTUNITY TO BE HEARD, CONTRARY TO THE BASIC NOTIONS OF FAIRNESS DESCRIBED BY THIS COURT IN CELOTEX CORP. v. CATRETT.

The present case presents an opportunity for this Court to clarify the scope of its decision in *Celotex Corp. v. Catrett*, 477 U.S. 317. While this Court there recognized the vitality and propriety of summary judgment, the decision below expands appellate courts' power to affirm summary judgment in a manner that assuredly was not

contemplated by this Court in *Celotex*. This expansion, so soon after this Court's favorable view of summary judgment in *Celotex*, makes it imperative that this Court now clarify the upper limits of summary judgment authority.

Respondent correctly notes that courts properly may affirm summary judgment on a ground different from that on which the trial court relied. The State here disputes instead the Eighth Circuit's entry of summary judgment without any factual record supporting the basis chosen for decision, and without affording the parties an opportunity, required by Federal Rule of Civil Procedure 56, to make such a record. Petition for Writ of *Certiorari* at 11-13. Authorities Respondent cites all reflect an affirmance that is supported by the record.

There is no support in the record for the court's finding that "damages" has a particular, technical meaning in the insurance industry which excludes environmental response costs. Indeed, the record belies such a conclusion: the insurers below repeatedly referred to the State's claims as claims for "damages." Petition for Writ of *Certiorari* at 6, n.10. The court extracted its conclusion from the opinions of courts of other jurisdictions—opinions reached without any evidentiary hearing. Because the case law is sharply divided regarding the scope of the term "damages" (*See* Appendix to Petition for Writ of *Certiorari* at A17, 25-26), the court's finding cannot fairly be classified as a well-established principle of insurance law.

The *Celotex* opinion stresses the importance of fairness in summary judgment proceedings. First, the non-moving party must have adequate time for discovery to come forward with evidence of a factual dispute. 477 U.S. at

322. Second, the moving party must inform the court of the basis of its motion and identify those portions of the documents on file which demonstrate the absence of a genuine issue of material fact. 477 U.S. at 323. Third, before a District Court enters summary judgment *sua sponte*, the losing party must be put on notice and have the opportunity to come forward with all evidence. *Id.* Fourth, in discussing potential problems with premature summary judgment motions, this Court recognized a trial court's power to deny summary judgment or continue the hearing if the non-moving party has not had an opportunity to make full discovery. 477 U.S. at 325.

All of these considerations reflect the importance of fairness in summary judgment proceedings. They reflect that fairness requires that the non-moving party have the opportunity to discover and present evidence of a factual dispute. Fairness requires the opportunity to be heard.

Fairness is preserved if an appellate court affirms summary judgment on a basis supported by the record because the record confirms notice and the opportunity to be heard. When a court affirms summary judgment on a basis not raised until appeal, and for which there is no support in the record, the non-movant's opportunity to be heard is foreclosed. The problem is particularly acute here because evidence contrary to the court's finding exists[4]—evidence which the court's Rule 56 procedures foreclosed the State from presenting.

Instead of addressing these issues, respondent claims that the drafting history proffered by the State is irrelevant

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4. See Petition for Writ of *Certiorari* at 15-18 and Appendix thereto at A106-24.

and totally unrelated to the case. Yet no better evidence exists of an industry's intended meaning of standard-form policies than its own drafting history.

Respondent's suggestion that extrinsic evidence is admissible when a contract is unambiguous assumes the Eighth Circuit properly could rule on ambiguity *without* evidence of intent. The Eighth Circuit's recognition of a lay interpretation in conflict with a claimed technical understanding mandates the inquiry into intent. This is especially true in Missouri where state law requires deference to the lay insured's understanding of policy terms.

Even if this evidence were inadmissible, production of admissible evidence is not necessary to avoid summary judgment. *Celotex*, 477 U.S. at 323. Moreover, the State is not asking this Court to make a factual determination. The State intends only to assure this Court that remand for a factual hearing will not be fruitless.

III. THE EIGHTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Supreme Court Rule 17.1(a) permits this Court to grant a writ of *certiorari* when a federal court of appeals "has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." As discussed above, the Eighth Circuit opinion directly conflicts with opinions from the District of Columbia Circuit. *See, Keene Corp.* and *Eli Lilly, supra.* In addition, in *National Aviation Underwriters, Inc. v. Altus Flying School,* 555 F.2d 778, 783 (10th Cir. 1977), the Tenth Circuit held summary judgment improper in a nearly identical fact situation. Similarly, in *McGraw Edison Credit Corp. v. Motorola Communications and Electronics,*

Inc., 579 F.2d 885, 886 (5th Cir. 1978), the Fifth Circuit held that summary judgment was improper in contract interpretation because of the factual inquiry necessary to determine the parties' intent.

IV. THE NATIONAL IMPORTANCE OF CERCLA COST RECOVERY ACTIONS RENDERS THE EIGHTH CIRCUIT'S ABANDONMENT OF APPLICABLE SUBSTANTIVE AND PROCEDURAL LAW PARTICULARLY SIGNIFICANT.

Respondent claims that the State merely invites social engineering, rather than adherence to *Erie*, by presenting issues of material and substantial importance to governments seeking to recover environmental response costs under CERCLA. The respondent boldly asserts that the State asks this Court to dispense with contract terms and contract law and require deep-pocket insurance companies to financially support the State.

The State emphasized the importance of this case to require compliance with *Erie* and established summary judgment procedure. Environmental contamination is an important and expensive national concern. State and federal funds available for remedial action are not unlimited and depend on cost recovery actions for replenishment. Often, responsible parties' insurers are the only viable source of cost recovery. Because environmental response cost recovery is so important it should not be denied without compliance with the applicable substantive and procedural law. The State does not request that this Court obligate deep-pocket insurance companies to provide state governments with financial support. Rather, the State requests that this Court require

the Court of Appeals to comply with the *Erie* doctrine and Rule 56 summary judgment procedures.

Respondent attempts to minimize the significance of this decision by noting numerous other courts have reached similar conclusions. The existence of this case law, however, does not render the Eighth Circuit's decision substantively or procedurally correct.[5] If left to stand, *NEPACCO* will become the foremost authority cited by courts throughout the nation to deny states recovery, authorized by 42 U.S.C. § 9607, of environmental response costs associated with hazardous waste sites within their borders. The Eighth Circuit's reliance on the law of other jurisdictions suggests this prediction will become a reality.

Contrary to the insurers' assertion, this opinion already has broadly affected and will continue to affect decisions across the country where other state governments, and even the federal government, seek to enforce their federal rights to funding assistance for correcting environmental hazards. *The Travelers Ins. Co. v. Ross Elec. of Washington,* 685 F.Supp. 742 (W.D. Wash. 1988) (following *NEPACCO*); 3 Toxics L. Rep. (BNA) 150-51 (June 29, 1988) (discussing *Transport Indem. Ins. Co. v. Argonaut Ins. Co., Inc.,* Cal. Super. Ct., San Mateo Co., No. 262425, in which California state trial court summarily denied insurance coverage for CERCLA response costs; insurers cited *NEPACCO* to support summary judgment motion). *See also, Intel Corp. v. Hartford Acc. & Indem. Co.*, N.D. Cal., No. C-87-20434-RPA (April 26, 1988) (considered but declined to follow *NEPACCO*). The decision's impact on the federal government's ability to recover response costs already is being felt. 3 Toxics L. Rep. (BNA)

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5. Moreover, the present case does not involve injunctive relief or purely economic damage and, therefore, is distinguishable from cases Respondent cites.

1338-39 (May 4, 1988) (discussing *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, U.S. District Court for the District of Columbia, No. 83-3347, in which insurers seek reconsideration of a March 2, 1988 order granting the United States permission to intervene in declaratory judgment action in light of *NEPACCO*). If *certiorari* does not issue here, this impact will continue to grow.

The present case represents a monstrous, unprecedented departure from governing substantive and procedural law. The Eighth Circuit ignored Missouri law and denied the State the opportunity to be heard or to demonstrate the existence of a factual dispute on the very issue on which summary judgment was ultimately entered. These actions undermine the basic concept of fairness so fundamental to our judicial system and so conflict with this Court's previous opinions as to require this Court's intervention.

WHEREFORE, the State of Missouri prays this Court grant the State's petition for *certiorari* to review the Eighth Circuit's judgment.

Respectfully submitted,

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